December 22, 2005

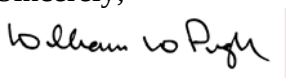
Secretary Vernon A. Williams
Surface Transportation Board
1925 K Street N.W., Suite 700
Washington, D.C. 20423

Dear Secretary Williams:

Transmitted herewith are the Reply Comments of the National Classification Committee, included are statements by Joel Ringer and William W. Pugh.

If there are any problems with this transmission, please contact Amanda Sisk at phone no. 703-838-1838 or email at sisk@nmfta.org.

Sincerely,



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Before The
Surface Transportation Board

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STB Ex Parte No. 656 (Sub-No. 1)
Investigation Into The Practices of the National Classification Committee

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Reply Comments
Of
National Motor Freight Traffic Association, Inc.
And The
National Classification Committee

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National Classification Committee

Due and Dated: December 22, 2005

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SECTION I

PREFATORY STATEMENT

I.

PREFATORY STATEMENT

The singular purpose of this investigation is "to develop a more thorough record regarding charges of abuse of market power by the National Classification Committee (NCC), in its practices generally, and particularly in connection with its action changing the classification of lighting products and fixtures in 2004." Market power, as that term is applied in the antitrust arena, is the ability of a firm to affect the price which will prevail in the market in which it trades. Monopoly power is the obtaining or maintaining of the power to control price or to exclude competition. *See United States v. Griffith*, 334 U.S. 100, 68 S. Ct. 941 (1948); also L. Sullivan, *Antitrust*, Pt. A., §§7-8 (1977). Those "powers" are entirely beyond the reach of the NCC under its approved classification-making procedures.

The NCC establishes freight classifications pursuant to a collective agreement among carriers sanctioned by law (49 U.S.C. §13703(a)(1)), and subject to approval and regulatory oversight by the Board (49 U.S.C. §13703(a)(2),(3),(5) and (c). To be approved an Agreement must be found by the Board to be in the public interest and to serve the goals of the National Transportation Policy. The NCC's present Agreement was found to meet those regulatory objectives. The standards by which freight classifications are established or reclassified have been promulgated by the former ICC (*Investigation into Motor Carrier Classification*, 367 I.C.C. 243 and 367 I.C.C. 715-717 (1983), and govern the determination of reasonableness to which collective classification actions are subject (49 U.S.C. §13701(a)).

While freight classifications are part of the motor carrier pricing mechanism, the role of the classifier is separate and distinct from the ratemaker. (*See Charge For Shipments Moving On*

Order-Notify Bill of Lading, N.M.F.T.A., 367 I.C.C. 330 (1983). A freight classification, or reclassification, does not create the price which prevails in the market on a shipment of the involved commodities. The class ratings, like the class rate in the carrier's tariff, are benchmarks by which pricing decisions are made by the carrier and agreed to by the shipper. A classification does not dictate a market rate, and none of the shipper interests or other commentators in this or any related proceeding have shown otherwise.

Similarly, there is not a single fact of record demonstrating that the NCC, or its member carriers, uses the classification process to control price or exclude competition. Given the reality of motor carrier pricing in the marketplace, which is well acknowledged to be extremely competitive, any such allegation would be groundless. Thus, market or monopoly power is not reasonably in issue here.

A cursory review of the comments submitted makes plain that they are not directed to "abuses of market power," but repeat opposition to antitrust immunity, restate proposals seeking shipper voting in the classification process, propose further impediments to collective-classification making, and fail to rationally explain why, after alleging "bias" in several classification actions, they did not use the arbitration process that was insisted upon by certain shipper groups as a means of ensuring "fairness," and which was implemented by the NCC and approved by the Board.

The opposing comments do not demonstrate any failure on the NCC's part in strictly following the classification procedures in its Agreement or in applying the established standards in classifying commodities. Their objections run to classification actions for which they have not sought arbitration, reconsideration by the NCC, or filed a protest and/or complaint to the Board challenging the reasonableness of those classifications.

This reopened record neither validates any "charges of abuse of market power" by the NCC, nor justifies the failure of shippers to seek arbitration, or other available NCC and agency vehicles, to resolve objections they may have as to a classification action taken by the NCC.

SECTION II

STATEMENT OF

WILLIAM W. PUGH

II.

STATEMENT

OF

WILLIAM W. PUGH

My name is William W. Pugh. Since November of 2001, I have been the Executive Director of the National Motor Freight Traffic Association, Inc. (NMFTA). For the previous 25 years, I was General Counsel to the NMFTA. In the capacities of Executive Director and General Counsel in which I have served NMFTA, I have been directly involved with the National Motor Freight Classification (NMFC) and the procedures by which that publication is maintained by the motor carrier members of the National Classification Committee (NCC). I previously submitted Opening, Reply, and Rebuttal Statements on behalf of NMFTA and NCC in Ex Parte No. 656, Motor Carrier Bureaus - Periodic Review Proceeding.

This statement is submitted in response to the Surface Transportation Board's October 12, 2005, decision in STB Ex Parte No. 656 (Sub-No. 1), Investigation into the Practices of the National Classification Committee. The STB indicated it has instituted "this separate investigation to develop a more thorough record regarding charges of abuse of market power by the National Classification Committee (NCC), in its practices generally, and particularly in connection with its action changing the classification of lighting products and fixtures in 2004." My statement will address a number of general issues in this proceeding.

I. Antitrust Immunity For The NCC Is Not Contrary To The Public Interest

Several shipper spokesmen argue that extending the NCC's antitrust immunity would be contrary to the public interest because the NCC's collective classification-making activities should be subject to the antitrust laws[1]. This argument fails to recognize that Congress has determined on many occasions that the collective rate and classification making processes should be eligible for antitrust immunity.

In 1948, Congress passed the Reed Bulwinkle Act which offered antitrust immunity to protect the collective rate and classification-making activities of motor carriers. In order to receive this immunity, classification-making organizations were obliged to develop Section 5a Agreements and have these agreements approved by the ICC. The NCC's Section 5a Agreement was approved by the ICC in 1956. Congress has since reaffirmed its authorization of antitrust immunity for collective rate and classification-making organizations on many occasions, most recently in connection with the Motor Carrier Safety Improvement Act of 1999, P. L. 106-159, 113 Stat. 1748 (1999)[2]. Under the provisions of the current (1999) codification of the pertinent statute (49 USC §13703), the NCC will retain the antitrust immunity unless and until the STB decides that its classification-making activities are contrary to the public interest and the issue of whether an Agreement is in the public interest is normally determined by

[1] See Comments of National Small Shipments Traffic Conference, Inc.; Comments of the American Lighting Association; Comments of National Electrical Manufacturers Association; Comments of Pacific Coast Lighting.

[2] Other legislation in which Congress reaffirmed its determination that collective classification-making should be offered the protection of antitrust immunity are;

Motor Carrier Act of 1980, P.L. 96-296, 94 Stat. 793 (1980)
Motor Carrier Ratemaking Study Commission (June 1, 1983)
Trucking Industry Regulatory Reform Act, P.L. 103-311, 103 Stat. 1683 (1994)
Interstate Commerce Commission Termination Act of 1995, P.L. 104-88, 109 Stat. 803 (1995)

reference to the National Transportation Policy (NTP), 49 USC § 13101. The NTP is governed by considerations apart from the federal antitrust laws.

In a letter submitted to the STB in the instant processing Congressman Nick Rahall, member of the House of Representatives Surface Transportation Sub Committee, stated:

> It has been my long-held belief that the efficient operation of the motor carrier industry, and its ability to serve both shippers and consumers alike, depends on the continuation of commodity classifications. No system other than the National Motor Freight Classification as maintained under the NCC Agreement provides for the grouping of products with comparable characteristics, or the separation of products that are dissimilar, for transportation purposes.

The NCC's need for antitrust immunity is apparent. In STB Decision Section 5a Application No. 61, (Decided December 10, 1998) concerning the STB's approval of the NCC's Agreement, certain changes were included to enhance shipper participation. The STB explained:

> We asked whether NCC's activities require antitrust immunity. While this agency is not charged with the responsibility of interpreting or carrying out those laws, we believe there is a sufficient possibility that the classification activity would, absent immunity, be subject to legal action under the antitrust laws to warrant considering granting immunity…moreover, we must assume from Congress's directive to grant immunity unless we find that the NCC's activities are not in the public interest that Congress believes that the NCC's members could otherwise be subject to the antitrust laws. The Department of Justice has never to our knowledge, in this proceeding or elsewhere indicated that the NCC's classification activities do not require immunity in order to avoid application of the antitrust laws. (Decision footnote 15, p. 5)

Finally, it should be recognized that as the NCC has previously testified in the Section 5a Application No. 61 proceeding, the NCC's member carriers have, on many occasions, made it very clear that, absent antitrust immunity, they could not incur the risk of antitrust liability in order to participate in classification-making activities.

II. Classifications Should Not Be Negotiated With Shippers

Several shipper comments filed herein suggest that the Classification is not necessary at all, and that freight rates should be the product of negotiations between shippers and carriers (statement of GENLYTE p. 1).

In response, we would point out that freight classification is designed to simplify shipper/carrier negotiations and enhance price competition. The negotiating process is simplified by dividing the class rate system into two components. The NMFC is the component that serves as a standard representing all of the characteristics of the involved commodities that impact on their movement by motor common carrier[3]. The NMFC is also the component that is devoid of economic considerations. While a commodity's transportation characteristics such as density and liability do represent elements that impact very substantially on motor carrier operations, they are elements that are determined through an objective evaluation of facts and data, not through a bargaining process. As Congress has observed, freight classification serves to enhance competition by allowing both the shipper and carriers to "know what they're talking about" Motor Carrier Act of 1980, P. L. 96-296, 94 Stat. 793 (1980).

In STB Decision Section 5a Application No. 61 (Decided December 10, 1998, p. 5) the Board explained:

> Viewed conceptually, classification can play a positive role in motor carrier pricing. By providing standardized groupings of commodities based solely on the transportation characteristics, classifications can reduce costs to carriers in determining the transportability of the commodities they handle; it can allow them to price their service more efficiently than if they had to assess its portability individually, and presumably it can permit them to pass on this efficiency to the

[3] The other component comprises the economic considerations that are embodied in the carriers' rate tariffs.

shippers in the overall prices charged their customers. Many of the opponents of renewal do not dispute the general benefit of the NCC's classification activities.

Even the Department of Justice recognizes the benefits of the NMFC, pointing out (comments at page 5) that, "A classification system provides useful information concerning the transportation characteristics of commodities," and "A system such as the NCC's National Motor Freight Classification creates a framework of reference that can simplify the process of quoting and negotiating rates for those who use it."

III. NMFC Can Not Remain "Frozen" Without Change

NASSTRAC (comments at page 11) argues that "If the NCC were to end its freight classification activities, the NMFC would still exist, and could still be used in conjunction with rate bureau class rates to establish baseline rates for the purpose of discounting." This suggestion, which has been made and rebutted in the NCC's Section 5a Application No. 61 proceeding, is contrary to the fundamental purpose of classification, which is to reflect the current relationships between the transportation characteristics or "transportability" of commodities.

The NMFC must be continuously adjusted to account for new products as they enter the stream of commerce or changes that are made in existing products. For example, if, for a particular commodity, heavier density materials such as wood and steel are replaced by light density materials such as plastic, the NMFC must be adjusted to reflect those changes as they may impact substantially on the transportation characteristics of the involved commodity. If the Classification can not keep up with such changes in commodity characteristics, it would become a source not of information but of

"misinformation" regarding the relationship between commodities. Clearly, this would fail to fulfill the NCC's obligation, under 49 U.S.C. §13703(a)(5), of maintaining the NMFC so as to insure that it is reasonable.

IV. The NCC Was Not Obliged To Show That The Transportation Characteristics Of The Lighting Fixtures Had Changed

Some of the spokespeople for the lighting industry suggest that the NCC had acted improperly by changing the classification of lighting fixtures without showing that the transportation characteristics of those products had changed. (See comments of Acuity Brands Lighting, ALA p. 1). While having some superficial appeal, this argument is contrary to a fundamental principle of freight classification which is that an article is properly classified with other articles having comparable transportation characteristics. In Civil action No. 94 -- 1032 NMFTA, Inc. and NCC v. ICC and USA, (1995) the United States Court of Appeals for the District of Columbia Circuit reversed the Interstate Commerce Commission and found that the ICC had departed from its long-established principles of classification by disallowing the NCC's proposed reclassification of poisons materials designated PIH's. More specifically, the Court found no justification for the ICC's decision requiring the NCC to show a substantial change in the transportation factors for the involved PIH's, as long as the classes proposed for the PIH's were similar to those applicable to other articles having similar transportation characteristics. As explained in the statement of Joel Ringer, the NCC has in fact, justified its reclassification by demonstrating that the transportation characteristics of the involved lighting fixtures were comparable to the characteristics of other commodities having the proposed ratings.

V. The Relationship Between Density And Class Can Not Be Linear

The NCC's density guidelines are designed to represent the minimum average density that would be associated with each class. These class/density relationships that comprise the NCC's density guidelines reflect well-established precedent including decisions of the ICC and STB and the classification-making experience of the NCC.

NASSTRAC (comments at page 7) attempts to establish a new classification principle which would require a linear relationship between class and density, and it contends that the NCC's Density Guidelines are inequitable to the extent that they are nonlinear. This argument manifests a misunderstanding of the role of density in freight classification. If, as NASSTRAC suggests, density were linearly related to class, the result would be to grossly distort the common sense relationships between density and class that the ICC and STB have found reasonable on many occasions. The reason for this is the following: the relationship between density and class is inverse so that an increase in density produces a decrease in class. For example, it should be apparent that a 2-pound per cubic foot increase in density would have far greater impact on the transportability of a light and bulky commodity of 1-pound per cubic foot (i.e. tripling its density) than it would have on a much heavier commodity having a density of 20 pounds per cubic foot. In contrast, under NASSTRAC's proposed linear density scale, a 2-pound per cubic foot increase in density would result in precisely the same decrease in class for a product no matter where that product is located in the density spectrum.

VI. Classification-Making and Ratemaking Are Based on Separate Considerations

NASSTRAC takes exception to my previous explanation that the existing density scale is necessary to maintain "reasonable weight/revenue relationships" (see NASSTRAC comments at p. 8). They contend that this explanation is inconsistent with the principle that the NCC's classification actions are unrelated to ratemaking. NASSTRAC is wrong.

In fact, in accord with well-established classification principles, for any commodity the class must be determined by reference to the four recognized transportation characteristics: density, stowability, handling, and liability. Costs, charges, rates, and other economic factors cannot be taken into consideration in determining a class for a particular article. However, that is not to say that the density scale should not reflect the maintenance of an appropriate weight/revenue relationship. In Incandescent Electric Lamps or Bulbs, 44 MCC at 501,512, the ICC explained the relationship between density and revenue, all other factors being equal.

> In light of the paramount importance of space on the determination of reasonable motor common carrier classification ratings, we are of the opinion such ratings should be arranged that, so far as practicable, as the densities of the commodities decrease, the revenues thereon should remain approximately equal.

VII. The Classification Process Imposes Burdens On The Shippers, But Not On The Carriers.

Several of the shipper representatives complained that the NCC's classification process imposes considerable burdens on shippers that are not shared by the carriers (see comments of NASSTRAC p. 2, 5; ALA p. 4). In support of this contention, they point

out the obvious fact that the NCC's staff works for the carriers. This argument fails to consider that it is, after all, the carriers that fund the NCC's staff. Also, while facts and evidence are gathered by staff, the classification-making process is actually conducted by members of the NCC itself. The NCC consists of up to 100 employees of motor carriers nationwide who incur considerable costs and take time away from their busy schedules to participate in classification meetings. In contrast, the shippers are being asked to support the classification process only by providing information on the transportation characteristics of their own products - information that is readily available to them. Further, for interested shippers who wish to participate by filing a classification proposal, the process is relatively easy, there are no fees, and the NCC staff is available to assist these shippers in preparing their proposals, free of charge.

VIII. Giving Voting Rights To Shippers Would Introduce Bias Into The Classification

We would point out that while many of the shipper representatives argue that they should be entitled to voting membership on the NCC, shippers are not authorized to participate in the classification-making process by the pertinent statute [49 USC §13703]. The STB previously addressed the notion in its Decision served on December 10, 1998, where it explained:

> Some of the shipper groups suggest that these concerns [regarding the shipper's voice on the classification process] could be addressed by granting immunity on the condition that shippers be given equal voting rights as to classification matters. None, however, has explained how we could feasibly require that shippers have voting powers on the NCC equal to those of the carrier members STB decision Section 5a application No. 61 (Decided December 10, 1998 p. 6).

An additional problem is revealed by the fact that, of necessity, the carriers have no ownership or financial interest in a commodity, product or rule being considered for classification. In contrast, shippers would almost always have a potential conflict of interest; or be totally uninformed, inexperienced or disinterested in regard to the central issue considered in the determination of an appropriate class, that is, evaluating the relative burdens that the transportation of the involved commodity imposes on the operation of motor carriers through an evaluation of their four recognized transportation characteristics.

Finally, I would note that some shipper groups complain of being burdened by the NCC's requests for information, even information that is pertinent to the transportation characteristics of their own products and should be readily available (See NASSTRAC pp. 3, 5; American Lighting Association p. 4). It is interesting that these same shipper representatives argue that half of the NCC's membership should consist of shipper representatives. In essence the shippers are arguing that they should provide 50 representatives (equal to those of the carriers) on the NCC, while at the same time they object to the far smaller commitment and expenditure of time and resources required in responding to requests by the NCC's staff for information pertinent to a particular product which they ship.

IX. Certain Shipper Groups Have Refused To Participate

Several of the shipper comments filed in this proceeding complained that the Classification system does not work for shippers, because shippers are not inclined to participate in it (American Lighting Association p. 2; NASSTRAC p. 2, 13). It seems

that, on one hand, these shippers are arguing that they must have a greater voice in the classification-making process, while on the other they have indicated that they are not inclined to participate in it in any way. For over 25 years, shippers have been asking the ICC and STB to require even more, different, and additional changes in the NCC's Section 5a Agreement, allegedly to give them a greater opportunity to participate in the classification process. Many of these shipper requests have been granted in a variety of proceedings[4] and now, after all of the requested procedural safeguards have been put in place to protect shippers and enhance their access to the Classification system, they are not inclined to participate.

X. The NCC's Arbitration Process Does Not Favor The Carriers

Throughout Section 5a Application No. 61(Sub-No.6), the predecessor to the instant proceeding, various shipper groups, including NASSTRAC, urged the STB to require the NCC's Section 5a procedures to include arbitration for parties who are

[4] Sec. 5a – Related proceedings include the following:

a. Ex Parte 297 – initiated June 15, 1973 – General investigation into various activities of rate-making associations operating pursuant to Section 5a Agreements

b. Ex Parte 297 (sub 2) – initiated June 24, 1977 – establishment of rule to protect carriers' right to independent action

c. Ex Parte 297 (sub 3) – initiated January 6, 1978 – whether reforms of railroad collective ratemaking should be extended to motor carriers

d. Ex Parte 297 (sub 4) – initiated January 6, 1978– ICC reopened all application proceedings for additional evidence to be sure agreements still qualify for Commission approval

e. Section 5(a) Application No. 61 (Amendments No. 1-4) - initiated May 30, 1978 – amendments submitted by NCC pursuant to Ex Parte No. 297

f. Ex Parte 297 (sub 5) – initiated August 21, 1980 – ICC implementation of the Motor Carrier Act of 1980

g. Section 5(a) Application No. 61 - initiated November 13, 1997 – STB established a schedule for filing of opening and reply comments regarding renewal of our 5a Agreement

h. Section 5(a) Application No. 61 (Sub-No. 6)

dissatisfied with the classification actions of the NCC. The joint comments filed in that earlier proceeding of NASSTRAC/NITL (Comments, p. 13) reflect their insistence as well as the insistence of various other shipper groups that arbitration was necessary to eliminate a purported "perception of bias" in the classification process. In its decision of November 20, 2001, in Section 5a Application No. 61 (Sub-No. 6) at page 19, the STB explained its action based on the request of these shippers:

> The shippers' strongest concern is essentially that the motor carriers serve as the law clerks, prosecutors, judges, and jury in the classification process. Shippers are discouraged by this process from going back to the motor carrier members of the NCC to file what is in effect an administrative appeal. We believe the best way to provide the necessary assurance of fairness in the collectively established classification process is to require the NCC to provide interested parties with an option of review by a neutral arbitrator.

Further, in its March 21, 2003, decision in Section 5a Application No. 61 (Sub-No. 6), at page 6, the STB stated:

> In our 2001 decision, at 20, we found that shippers perceived that the classification system is biased because of what they saw as the lack of an impartial decision-making in the early stages of the process. This perception, we reasoned, was likely a factor in the lack of shipper participation in classification matters. To address this perception of bias and to encourage shipper participation, we required NCC to provide the option of appealing an initial NCC decision to a neutral arbitrator.

Basically, in the Section 5a Application No. 61 proceeding, shippers of lighting products insisted that the decisions of the NCC are biased and to eliminate this bias, shippers must have the opportunity for appeal of NCC's decisions to a neutral arbitrator. The STB decided that in order to eliminate this perception of bias and encourage shipper participation, the NCC must establish an arbitration process for appeals of NCC decisions. The NCC developed and the STB has approved an arbitration system that was

in scrupulous compliance with the STB's requirements. Nevertheless, NASSTRAC still has indicated that shippers have no interest in participating in an arbitration system that they argue is prejudiced to shippers (see American Lighting Association comments, p. 2 and NEMA, p. 2).

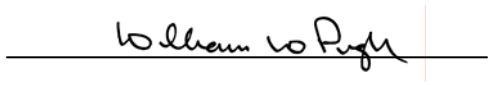
The shippers' objections to the NCC's arbitration system are clearly without merit. It is apparent that the involved shippers recognize that their arguments relating to the substance of the NCC's action would not withstand scrutiny.

CONCLUSION

The Surface Transportation Board and its predecessor the ICC have, over the course of the last 25 years and many proceedings, enacted rigorous requirements that are designed to protect the public interest and to curb any opportunity for abuse of market power by the involved motor carriers. The NCC has made many changes in its classification-making procedures and these changes have implemented each and every one of the ICC and STB requirements. The NCC's Section 5a classification-making procedures are structured to promote the fair and open evaluation of the burdens that the transportation of the myriad commodities moving in commerce impose on the operations of motor carriers. The system also provides shippers a maximum amount of notice, and transparency, including early access to information that is of record and maximum input in the actual determination of classifications. These changes satisfy the DOJ's argument that the classification system should be cleansed of anti-competitive elements (DOJ comments at page 4). Nevertheless, now after having obtained the changes that they have

lobbied for, these shipper groups have decided that they are not inclined to participate in the classification system.

I, William W. Pugh, state that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on December 22, 2005.



WILLIAM W. PUGH

SECTION III

STATEMENT OF

JOEL L. RINGER

III.
STATEMENT OF JOEL L. RINGER

This statement is submitted by Joel L. Ringer, Manager of Classification Development for the National Motor Freight Traffic Association, Inc., and National Classification Committee, 2200 Mill Road, Alexandria, Virginia 22314. I previously submitted statements in the lead proceeding, Ex Parte No. 656, Motor Carrier Bureaus—Periodic Review Proceeding.[1]

As stated by the Surface Transportation Board (STB), the instant proceeding was instituted:

> to develop a more thorough record regarding charges of abuse of market power by the National Classification Committee (NCC), in its practices generally, and particularly in connection with its action changing the classification of lighting products and fixtures in 2004.[2]

Comments have been filed with the STB relating to the reclassification of lamps and lighting fixtures as well as other recent actions by the NCC. Those comments contain numerous inaccuracies, misrepresentations and falsehoods regarding the NCC's activities and practices.

Lamps and Lighting Fixtures

In my previous statements, I noted that opposition to renewal of the NCC's antitrust immunity by the National Electrical Manufacturers Association (NEMA), the American Lighting Association (ALA) and several manufacturers or shippers of lamps or lighting fixtures—collectively, the lighting industry—was in direct response to the

[1] See Comments, Reply Comments and Rebuttal Comments of National Motor Freight Traffic Association, Inc., and the National Classification Committee, dated March 2, 2005, April 1, 2005 and April 21, 2005, respectively.
[2] Surface Transportation Board Decision, STB Ex Parte No. 656 (Sub-No. 1), Investigation into the Practices of the National Classification Committee, decided October 12, 2005 and served October 13, 2005, at page 1.

reclassification of lamps and lighting fixtures in 2004 by the NCC. I also discussed that reclassification in considerable detail in order to demonstrate that: 1) the NCC had worked cooperatively with the lighting industry; 2) the NCC had acted in full accord with its STB-approved Section 5a Agreement; and 3) the classification changes approved by the NCC were consistent with STB-recognized classification principles and criteria.

Since the reclassification of lamps and lighting fixtures is at the heart of the STB's decision to institute this new proceeding, I believe it is necessary to once again detail the actions taken by the NCC and the lighting industry in this regard.

The Reclassification of Lamps and Lighting Fixtures

Subject 9 of NCC Docket 2004-2 (May 2004) was a proposal by five member carriers of the NCC to amend the classification of lamps, lighting fixtures and parts thereof. The proposal was docketed in view of extensive data showing that the classification provisions then in effect did not reflect the transportation characteristics of the involved products, and the carriers sought to bring the provisions in line with accepted NCC policies and guidelines. A copy of the proposal is appended hereto as Attachment A.

The carriers' proposal was considered by the Classification Panel that met on May 4, 2004. In accord with the NCC's Section 5a procedures, Docket 2004-2 was issued on March 4, 2004, 61 days prior to the May 4 public meeting. It was posted on NMFTA's website along with the public docket file. A printed copy of the docket bulletin was mailed to all members of the NCC—including of course the carrier proponents of the proposal and members of the Classification Panel scheduled to consider the proposal—as well as to all docket subscribers. It was also mailed directly to 66 shippers and shipper

representatives whom the NMFTA/NCC staff had identified as potentially having an interest in the proposal, including NEMA and ALA.

The docket bulletin—the printed version and as posted on the website—contained the full text of the proposal and, in the accompanying appendix, the complete staff report (analysis). The docket bulletin specified the date, time and location of the public Panel meeting; it specified how to contact the NMFTA/NCC staff member to whom the proposal was assigned; it stated where to find information for contacting the proponents; and it detailed how to obtain the raw data and other information of record in the NCC's public docket file, including almost 65,000 density observations in the NCC's possession.

Letters were timely received from 20 shippers and shipper representatives in opposition to the proposed changes, but none furnished data. Writing on behalf of NEMA and ALA, the shippers' lead representative at the time, Donald S. Varshine of Keystone Dedicated Logistics, recognized "a need for some [classification] adjustments," but disagreed with the proposed approach. He indicated the shippers wished to explore alternatives.

Mr. Varshine and six other shipper representatives appeared at the May 4, 2004 Classification Panel meeting. The shippers stated that they had not had sufficient time to gather relevant information on their own and again expressed their desire to develop an alternative proposal. They asked for the opportunity to do so, stating that they would conduct a survey of their members and have the results in time for consideration by the NCC at its scheduled meeting on August 3, 2004. The shipper representatives in attendance said further that they would accept classification provisions consistent with NCC policies and guidelines, as might be supported by the results of their survey.

In the spirit of cooperation with interested shippers, the Classification Panel agreed to their request. The Panel disapproved Subject 9 of Docket 2004-2 and redocketed the proposal for consideration by the full NCC in August 2004.

Following the Classification Panel meeting, Mr. Varshine told the NMFTA/NCC staff that the August 2004 NCC meeting posed a potential scheduling conflict for him. Although the conflict involved a matter unrelated to NCC or NMFTA business, the NCC rearranged its meeting agenda—essentially moving the morning session to the afternoon and vice versa—as an accommodation to Mr. Varshine and the other shipper interests.

The redocketed proposal was designated Subject 10 of Docket 2004-3 (August 2004). In accord with the NCC's Section 5a procedures, the docket bulletin was issued on June 3, 2004, 61 days prior to the NCC's public meeting on August 3. Again, in accord with the NCC's Section 5a procedures, the docket bulletin was posted on NMFTA's website. A printed copy was mailed to all members of the NCC, to all docket subscribers and to (now) 76 shippers and shipper representatives believed to have an interest in the proposal, including NEMA and ALA.

Docket 2004-3 contained the full text of the proposal, with the complete staff report (analysis) in the accompanying appendix. The docket bulletin specified all pertinent information relating to: the date, time and location of the NCC's public meeting; contacting the assigned NMFTA/NCC staff member as well as the proponents; and obtaining the NCC's public docket file.

The public docket file was posted on NMFTA's website and made available to all interested persons on June 3, concurrent with the docket bulletin, 61 days in advance of

the NCC's public meeting. The public docket file contained all pertinent information in the NCC's possession, including now *more than* 65,000 density observations.

A statement was timely submitted by Mr. Varshine on behalf of NEMA and ALA with the results of the shipper survey, claiming to represent over one million "transactions." *However,* while the NCC had made available to the shippers all of the raw data in its files, including tens of thousands of density observations, the shippers provided no raw data whatsoever.

Subject 10 of Docket 2004-3 was considered at the NCC's public meeting on August 3, 2004 with 12 shipper representatives in attendance. The shippers discounted the NCC's data by characterizing as non-representative over 65,000 density figures relating to actual shipments that moved via member carriers. They also ignored the fact that their own study, though unsupported by any raw data, confirmed the NCC's research in that it showed densities for lamps and lighting fixtures to be distributed throughout a very wide range, with generally favorable stowability, handling and liability characteristics.

Moreover, the shippers abandoned their own position that some classification adjustments were in order, and they failed to live up to the commitment they had made at the May 4, 2004 Classification Panel meeting to accept classification provisions consistent with NCC policies and guidelines.

Instead, the shippers insisted that their (unsupported) study justified the continuation of the then-current classification provisions, even though it had been demonstrated that those provisions were not in keeping with NCC policies, including the density guidelines.

Following a lengthy and comprehensive discussion, the NCC voted overwhelmingly to approve the changes proposed in Subject 10 of Docket 2004-3.

The Lighting Industry Failed to Provide Any Raw Data Relating to the Transportation Characteristics of Lamps or Lighting Fixtures

The lighting industry would have the STB believe that, in approving the reclassification of lamps and lighting fixtures, the NCC did not take into consideration the lighting industry's study. Acuity Brands Lighting goes so far as to say, "The Lighting Industry's data was ignored and the NCC elected to go with the data provided by the NMFTA staff." [3]

But while the lighting industry's study purported to represent over one million "transactions," the number of actual density figures provided by the lighting industry totaled exactly zero!

As already mentioned, the NCC had in its possession more than 65,000 density figures relating to actual shipments of lamps or lighting fixtures. And that data was included in the NCC's public docket file, freely available to any and all interested persons for inspection. The lighting industry, on the other hand, furnished no raw data whatsoever. This is significant, as the NCC had no way of confirming the accuracy of the shippers' information. More importantly perhaps, the shippers' lack of disclosure was contrary to what the STB envisioned in its approval of the NCC's current Section 5a Agreement.

In its decision of November 20, 2001,[4] the STB stated:

[3] Comments of Acuity Brands Lighting, at page 2.
[4] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, decided and served November 20, 2001, at page 16.

> [W]e find that the public interest requires that those who produce studies and analyses and who intend to rely upon them in support of a classification proposal—whether they be carrier interests or shipper interests—must make the raw data underlying the studies and analyses available to interested persons.

Thus, to assure fairness in the classification-making process, the STB viewed the full disclosure of information as being a two-way street. Not only was the NCC required to make available all pertinent information in its possession—which it did—but shippers were expected to do the same—which they did *not.*

ALA now attempts a post hoc explanation for not furnishing the raw data. It claims the data was confidential.[5] But that explanation does not bear scrutiny.

Information relating to a product's transportation characteristics is generally not commercially sensitive. The STB, addressing the issue of confidentiality in its November 20, 2001 decision,[6] reached this very conclusion:

> [F]or the most part, information about the physical transportation characteristics of commodities commonly transported in trucks will not involve confidentiality concerns. The commodities are readily available on the open market, where their physical transportation characteristics can be directly observed. To perform its functions, the NCC does not require, and need not request, the type of information that most often raises confidentiality problems… Protective orders can be used to deal with the rare docket where confidentiality could be a concern.

The issue of "source identification" was treated separately, and the STB concluded that to avoid possible economic retaliation, the name of the entity providing data to the NCC may be "excised."

[5] ALA letter of December 1, 2005, at page 2.
[6] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at pages 15-16.

ALA's explanation for not furnishing raw data on lamps or lighting fixtures is also at odds with its recent actions in connection with the NCC's current review of ceiling fans, where ALA has submitted extensive, albeit redacted, data.

The lighting industry's protestations notwithstanding, in reclassifying lamps and lighting fixtures the NCC did *not* ignore the lighting industry's findings. The fact is that their study, though unsupported by any raw data, confirmed the NCC's information in that it showed densities for lamps and lighting fixtures to be distributed throughout a very wide range, with generally favorable stowability, handling and liability characteristics.

The NCC's Public Meeting of August 3, 2004 Provided an Open Forum for Both Shipper and Carrier Interests

All classification-making activities of the NCC and its Classification Panels are conducted at open, public meetings where any interested person can attend and participate. In these sessions, shippers and carriers can discuss and share information and views relating to classification issues.[7]

The lighting industry claims that the shipper representatives attending the NCC meeting on August 3, 2004 had hoped for such an open exchange of information and views with the NCC but none was forthcoming. According to NEMA:

> The lighting representatives sought to engage in a substantive exchange of views and materials in order to review data and proposed classification changes. No such exchange ever occurred; indeed, the "hearing" provided no exchange of views…[8]

ALA acknowledges that "several members of the trucking industry spoke" but says, "No questions were directed to any of [the lighting industry's] delegation."[9] That is

[7] Interested persons who cannot, or choose not to, attend the public meeting may still participate in the classification-making process by submitting data and/or comments in writing.
[8] NEMA letter of December 2, 2005, at page 2.
[9] ALA letter of December 1, 2005, at page 2.

blatantly false. Indeed, one question directed to the shipper representatives as to whether the lighting industry's one million-plus "transactions" related to actual shipments of lamps or lighting fixtures drew an angry response from Richard D. Upton, President and CEO of ALA.

The fact is that it was only after a lengthy, comprehensive and open discussion, and due consideration of all the information of record—including the material presented by the lighting industry—that the NCC voted to approve the changes proposed in Subject 10 of Docket 2004-3.

The Lighting Industry Did Not Challenge the Reasonableness of the Classification Change

The classification-making process has long incorporated safeguards against the establishment of unreasonable classifications. Under the NCC's previous procedures, dissatisfied parties could appeal actions of a Classification Panel to the full National Classification Committee. And there was oversight by the STB and its predecessor the Interstate Commerce Commission (ICC) via protest or complaint.

The NCC's current Section 5a Agreement includes a process whereby any party that disagrees with an initial classification action by a Classification Panel or the NCC can seek review by a neutral arbitrator. Reconsideration by the full NCC (in essence the old appeal process) is available as an alternative to arbitration if all parties objecting to the classification action agree to that procedure. And dissatisfied persons can still take the matter to the STB via protest or complaint.

In view of the lighting industry's opposition to, and obvious displeasure with, the reclassification of lamps and lighting fixtures, the NMFTA/NCC staff made certain that

the shipper representatives were advised of the remedies available to them under the NCC's Section 5a procedures, including the STB-approved arbitration process.

In a letter dated September 2, 2004, Malcolm O'Hagan, President of NEMA, and Richard Upton of ALA indicated that neither group would be seeking arbitration. No explanation for the associations' decision was given.[10] We responded in a letter dated September 9, 2004,[11] wherein we questioned why, if the lighting industry truly believed that the reclassification of lamps and lighting fixtures was not in keeping with established classification principles, neither NEMA nor ALA would avail themselves of all remedies at their disposal under the NCC's STB-approved procedures.

NEMA and ALA now attempt to explain their decision.

According to NEMA:

> While arbitration was an option proposed to us by NCC representatives, it was entirely possible that the panel would have been comprised of only carrier representatives, and utilize only the NCC data and record. Arbitration would have been a useless and expensive exercise.[12]

That explanation is beyond comprehension.

The arbitration procedures are incorporated into the NCC's Section 5a Agreement under Article V and are posted on NMFTA's website for public viewing. The procedures make it plain that the entire public docket record must be made available to the arbitrator.[13] That means, in the case of lamps and lighting fixtures, the arbitrator would have had the lighting industry's information as well as the NCC's information on which to base his or her decision.

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[10] Copies of the letter, which contained certain inaccuracies and misleading statements regarding the NCC's handling of the matter, were sent to all three members of the STB.
[11] Copies of which were likewise sent to all members of the STB.
[12] NEMA letter of December 2, 2005, at page 2.
[13] Article V, Rule 4.

Transportation Arbitration and Mediation, P.L.L.C. of Washington, DC—a group that is neither comprised of nor funded by motor carriers or motor carrier representatives —manages the arbitration process. The NCC's Section 5a Agreement requires that a list of at least 10 neutral arbitrators selected by an independent arbitration association be posted on NMFTA's website.[14] At this writing, a list of 20 available arbitrators selected by Transportation Arbitration and Mediation is posted on the website.

NEMA has managed to get it totally wrong, utterly mischaracterizing the arbitration process.

ALA similarly gets the arbitration process wrong. ALA says:

> Arbitration, as it is presently structured, provides the NCC with distinct advantages. Shippers, when opposing a revision of class ratings, must submit their evidence in advance of the NCC meeting. This allows the NCC the opportunity to develop its testimony to oppose the shipper's case. The shippers, if they request arbitration, are at a serious disadvantage because current rules require the arbitrator to make [a] judgment based only on existing data/arguments. Shippers are precluded from offering any evidence refuting NCC arguments made at the NCC meeting.[15]

ALA has not only managed to misrepresent the arbitration process but the NCC's classification-making procedures as well.

All facts, data and evidence relating to a docketed proposal must be submitted in advance of the public NCC or Classification Panel meeting where that proposal will be considered. And in the case of an NCC-sponsored proposal, such as lamps and lighting fixtures, the NCC's facts, data and evidence must be in the record *before* the shippers'; 30 days before to be exact. As the NCC's Section 5a Agreement requires, the NCC, as proponent, has to have its information in the public docket file, and available for inspection, 60 days prior to the NCC or Panel meeting where the proposal will be

[14] Article V, Rule 2.
[15] ALA letter of December 1, 2005, at page 2.

considered. Shippers and other interested persons—who might oppose or support the proposal—do not have to submit their information until 30 days prior to the meeting. Perhaps ALA could explain how this disadvantages shippers.

All interested parties, the NCC and shippers alike, have until 15 days prior to the meeting to submit a statement or analysis based on the information of record, but no new facts, data or evidence can be accepted or considered. Thus, contrary to what ALA says, no party has an unfair "opportunity to develop its testimony." All statements and analyses are due at the same time.

There is no unfair advantage either if the NCC's action goes to arbitration. As previously mentioned the arbitration procedures require that the entire public docket record—shipper as well as NCC information—must be made available to the arbitrator. All parties may submit to the arbitrator a statement of position,[16] and if a shipper, as the party seeking relief, believes it necessary to respond to the NCC's statement, it may ask the arbitrator to allow a rebuttal statement. No one, however, may introduce new facts, data or evidence.

But if NEMA and ALA had no faith in neutral arbitration, why then didn't they, or some other representative of the lighting industry, seek relief from the STB by filing a protest or formal complaint?

ALA says it "chose to participate in the STB's review" of the NCC's antitrust immunity. But that could not possibly be the reason for not filing a protest or formal complaint. For one thing, ALA's participation in Ex Parte No. 656 and Ex Parte No. 656 (Sub-No. 1) would in no way preclude it from also filing a protest or complaint with the STB.

[16] Article V, Rule 5.

For another, fighting renewal of the NCC's antitrust immunity while allowing the reclassification of lamps and lighting fixtures to take effect is akin to closing the barn door after the horses have left. Even if the STB were to deny continuation of antitrust immunity for the NCC, the amended classification provisions for lamps and lighting fixtures, as now published in the NMFC as item 109700, would remain in effect. Participating carriers would still be at liberty to use those provisions in their individual pricing decisions.

We believe the more plausible explanation for not filing a protest or complaint with the STB, or seeking neutral arbitration, is that the lighting industry realized that it could not prevail on the merits.

The NCC's Reclassification of Lamps and Lighting Fixtures Was Fully Consistent with STB-Recognized Classification Principles and Criteria

A copy of the proposal to amend the classification of lamps and lighting fixtures is appended hereto as Attachment A.

Information developed by the NCC on the public docket record revealed that lamps, lighting fixtures and parts thereof exhibited a very wide range of densities—specifically, from 0.06 to 144.58 pounds per cubic foot—with favorable stowability, handling and liability characteristics. The lighting industry said that it "generally concurs with the favorable assessment of the transportation characteristics of handling, stowability, and liability as presented by the NCC staff," and it confirmed the wide density range. Though not supported by any raw data, and while specific density figures were not furnished, the lighting industry's study showed the shippers' one million-plus "transactions" to range from less than 1 pound per cubic foot to in excess of 30 pounds per cubic foot.

Despite the lighting industry's incessant claims to the contrary, the classification provisions previously applicable to lamps or lighting fixtures were *not* consistent with NCC guidelines for the transportation characteristics exhibited. The following tables compare the density data of record to the classes that were in effect at the time.

Density Comparison
Lamps, or Parts thereof, NOI

Sub	Density Group (pcf)	Average Density (pcf)	Class Assigned	Class Per Guidelines
1	Less than 2	1.57	250	400
2	2 but less than 4	2.95	200	300
3	4 but less than 8	5.41	125	175
4	8 but less than 12	9.11	92.5	100
5	12 or greater	18.88	70	70

Density Comparison
Lighting Fixtures, or Parts thereof, NOI

Sub	Density Group (pcf)	Average Density (pcf)	Class Assigned	Class Per Guidelines
1	Less than 4	2.99	200	300
2	4 but less than 8	5.90	100	175
3	8 but less than 12	9.46	85	100
4	12 or greater	19.09	70	70

As the tables illustrate, with the exception of the class 70 assigned to lamps or lighting fixtures having densities of 12 pounds or greater per cubic foot, the previously applicable classes did not meet NCC guidelines.

The provisions approved by the NCC for lamps and lighting fixtures, on the other hand, are consistent with NCC policies. And perhaps more significantly, they are identical to provisions approved, based on very similar transportation characteristics, for cloth, fabric or piece goods, as named in NMFC item 49265, and which upon protest had

been found to be reasonable by the STB. For ease of reference and review, the provisions of item 49265 are appended as Attachment B.

The provisions of item 49265 were established by action taken on Subject 18 of NCC Docket 993 (August 1999). Information on that docket record showed that the involved cloth, fabric or piece goods exhibited a broad density range—from 2.2 to 64.6 pounds per cubic foot—and for the most part no unusual or significant stowability, handling or liability considerations.

Approval of those provisions was subsequently protested by the American Textile Manufacturers Institute (ATMI) and considered by the STB under Docket No. ISM 35007, Protest and Petition for Suspension and Investigation (National Motor Freight Classification). In its decision of January 20, 2000, served January 21, 2000, the STB neither suspended nor investigated the provisions, stating (at page 2 of the decision), "we believe that, as a general matter, density-based ratings are desirable, particularly for products…which pose no significant stowability or handling problems and where there are wide variations in shipment density." More importantly, in denying ATMI's request for suspension and investigation, the STB said (at page 3 of the decision) that the density-based provisions approved for cloth, fabric or piece goods—the very same provisions approved by the NCC for lamps and lighting fixtures—"appear to us [the STB] to be reasonable."[17]

[17] An earlier attempt by the NCC to establish density-based provisions for cloth, fabric or piece goods was suspended and set for investigation by the STB because those provisions would have resulted in "higher ratings for the lowest density shipments, without offering concomitantly lower ratings for the highest density shipments." (STB Docket No. ISM 35004, Protest of NCC Action Taken May 3, 1999 (National Motor Freight Classification), decided July 15, 1999 and served July 16, 1999, at page 3.) The STB found that the provisions ultimately approved by the NCC "remedied the problem that we [the STB] identified in our [earlier] decision…" (See January 20, 2000 decision in STB Docket No. 35007, at page 3.) Accordingly, the STB found those provisions to be reasonable.

By this decision, the STB established a standard of reasonableness with respect to density-based classifications; in particular when a substantial percentage of the densities exhibited exceeds 20 pounds per cubic foot. The NCC acted promptly to revise its Policies and Directives Pertaining to the National Motor Freight Classification to incorporate this standard.[18] In the interest of full disclosure, the NCC's classification-making Policies are part of every public docket file, and were included in the public file for lamps and lighting fixtures. The Policies are also posted on NMFTA's website and are available to anyone upon request, at no charge.

Since the STB's decision in Docket No. 35007, the NCC has assigned the same density-based provisions to a number of products and product groups that meet the agency's criteria for such provisions, including products related to lamps and lighting fixtures, i.e., NMFC item 109095, which names Diffusers, Globes, Lenses, Reflectors, Refractors, Shades or Side or Bottom Panels, lamp or lighting fixture, plastic; or Grids or Louvers, fluorescent lighting fixture or luminous ceiling, aluminum or plastic. And it is noteworthy that three such classifications—item 84260, Games or Toys; item 179180, Stationery or Stationery Sets; and item 181990, Tarpaulins, Drop Cloths or Covers—are the result of *shipper* proposals, evidencing that the lighting industry's objections to these density-based classifications are not universally shared by shippers or shipper groups.[19]

[18] At its very next meeting, on February 8, 2000, the NCC voted to establish the density scale found reasonable by the STB as its own standard for products exhibiting a wide density range where a substantial percentage of densities exceeds 20 pounds per cubic foot and no unusual or significant stowability, handling or liability characteristics are indicated. The NCC revised its Policies accordingly.

[19] Other such classifications approved by the NCC include: item 30160, Brass, Bronze or Copper Articles, NOI; item 35850, Building Sheet Metalwork, NOI; item 39270, Cabinets, NOI; item 52900, Cookware or Bakeware, sheet steel, NOI; item 63160, Switch Boxes, etc., other than steel; item 70050, Flags or Flag Sets; item 82270, Metallic or Wooden Furniture, NOI; item 95190, Hardware, NOI; item 103050, Barriers, Windows, etc., radiation shielding; item 124660, Machines, metal washing, etc.; item 152660, Cores or Tubes, NOI, paper or paperboard; item 157242, Traffic or Road Markers; item 158880, Bathroom or Lavatory Fixtures, NOI, etc.; and item 199970, Woodenware or Wooden Articles, NOI.

We believe it is reasonable to conclude that, in light of the STB's decision in Docket No. 35007, the lighting industry saw that filing a protest or formal complaint, or seeking neutral arbitration, would prove fruitless.

The NCC's Reclassification of Lamps and Lighting Fixtures Resulted in Reductions as well as Increases

Comments made by the lighting industry have left the misimpression that the NCC's action resulted in class increases only. For instance, in his letter of February 15, 2005, the Honorable Bart Gordon, Congressman representing Tennessee's 6th District, says, "I have heard from a business in Tennessee, Hermitage Lighting Gallery, that has serious concerns about cost increases associated with the new classifications for the lamp and lighting group recently approved by the NCC." The STB itself, in instituting this proceeding, noted "it appears that the lighting industry's opposition [to renewal of the NCC's antitrust immunity] was precipitated by an increase in the classification ratings for lamps and lighting fixtures that NCC put into effect in 2004." [20]

This characterization of the new lamps and lighting fixtures classification as an increase is inaccurate and borne of misleading comments from the lighting industry.

Attachment A is the proposal that reclassified lamps and lighting fixtures, showing both the previous provisions (designated in the proposal as "Present") and the new provisions approved by the NCC (designated as "Proposed"). A comparison of the two reveals that the NCC approved class *reductions* as well as increases, and in some cases there was no resultant change in the applicable class.

Furthermore, as approved by the NCC, the provisions for lamps and lighting fixtures now allow "bumping," whereas the previous provisions did not give shippers that

[20] Surface Transportation Board Decision, STB Ex Parte No. 656 (Sub-No. 1), Investigation into the Practices of the National Classification Committee, *supra*, at page 2.

option. Bumping, as set forth in NMFC Item (Rule) 171, allows shippers to obtain a lower class by declaring a density higher than the actual density. The shipper increases (artificially) the weight of the package(s) tendered to increase the density to the minimum provided in the next higher density group, which assigns a lower class. The higher weight is charged, but subject to the lower class. Bumping is done only when it results in a lower freight charge.

By bumping, shippers of lamps and lighting fixtures can mitigate the class increases and achieve additional reductions.

The NCC's Reclassification of Lamps and Lighting Fixtures Does Not Constitute an Abuse of Market Power

Since the NCC conducted itself in full accord with its STB-approved Section 5a procedures, and since the NCC used classification provisions found reasonable by the STB as its template in reclassifying lamps and lighting fixtures, we respectfully submit that the NCC's action does not constitute an abuse of market power.

Electric Ceiling Fans

ALA also alleges that the NCC's ongoing review of electric ceiling fans constitutes an abuse of market power.[21] In making that allegation, however, ALA mischaracterizes to the point of falsehood the events surrounding the NCC's consideration of the matter and the behavior of the NMFTA/NCC staff.

The NCC's Review of Electric Ceiling Fans

In February 2004, a member carrier requested that research be conducted on electric ceiling fans. The carrier observed that the current provisions for ceiling fans, NMFC item 61870, apply only on ceiling fans without lighting fixtures, whereas many

[21] ALA letter of December 1, 2005, at page 3.

ceiling fans being shipped today are equipped with lighting fixtures. In those instances it becomes necessary to invoke Item (Rule) 422, governing the "Classification of Combined Articles," which the carrier found to be unnecessarily cumbersome. Accordingly, the carrier requested that research be conducted on the transportation characteristics of ceiling fans. The carrier further directed that, upon completion, a report on the research should be presented to a Classification Panel with sample classification provisions consistent with NCC policies and guidelines for the transportation characteristics exhibited.

Responding to the carrier's request, a survey was initiated, and the matter was posted on NMFTA's website as an active research project.

ALA, which represents manufacturers and shippers of ceiling fans and ceiling fan light kits, was contacted by the NMFTA/NCC staff, as were NEMA and 43 individual companies, and asked to participate in the research.

A report on the NCC's research was presented to the Classification Panel that met on August 8, 2005. (Review Matter G of Docket 2005-3 (August 2005).) Information obtained through the research indicated that, consistent with NCC policies and guidelines, item 61870 should be amended to apply on ceiling fans *with or without lighting fixtures,* and the class assigned to ceiling fans having a density of less than 15 pounds per cubic foot should be increased from 100 to 125.[22] As per the requesting carrier's directive, the report included sample provisions reflecting these changes to item 61870.

[22] Item 61870 assigns classes based on a single density break at 15 pounds per cubic foot. Ceiling fans having a density of less than 15 pounds per cubic foot are assigned class 100, per sub 1 of the item, and ceiling fans having a density of 15 pounds or greater per cubic foot are assigned class 70, per sub 2.

Donald Varshine, representing ALA, appeared before the Panel. Mr. Varshine stated that ALA would support a proposal to expand the application of item 61870 to ceiling fans both with and without lighting fixtures, but would not support a class increase. Mr. Varshine had provided a substantial number of density figures shortly before the Panel meeting (actually, the Sunday afternoon preceding the early Monday morning Panel meeting), and there was insufficient time to properly analyze that extensive data. Accordingly, the Panel delayed action so that a thorough analysis could be performed. The Panel directed the staff to combine the data furnished by Mr. Varshine with that previously obtained, and report back with sample provisions consistent with NCC policies and guidelines at the Classification Panel meeting on November 8, 2005.

As directed by the August Panel, the staff analyzed all of the available information, which now indicated that, based on NCC policies and guidelines, the class assigned to ceiling fans having a density of less than 15 pounds per cubic foot should be increased from 100 to 110.[23] A report to that effect was presented to the Classification Panel that met on November 8, 2005. (Review Matter C of Docket 2005-4 (November 2005).)

ALA's Recounting of Events is Inaccurate and Untrue

ALA is correct that the Classification Panel that met on August 8 "directed the NCC staff to contact industry representatives to review data and report to the November

[23] The combined information showed that ceiling fans with densities of less than 15 pounds per cubic foot (pcf) had an average density of 8.59 pcf, which meets the NCC's minimum average density guideline of 8 pcf for class 110. Ceiling fans with densities of 15 or greater pcf had an average density of 19.61 pcf, which meets the NCC's minimum average density guideline of 15 pcf for the currently assigned class 70.

Panel." But its follow-up remark that "ALA and its designated representatives have no record of being contacted by the NCC staff" is a total fabrication.

In addition to multiple telephone conversations, Lisa Winter of the NMFTA/NCC staff has records of several email communications between herself and Mr. Varshine and/or John M. Cutler, Jr., a Washington, DC transportation attorney who is also representing ALA in this matter. Ms. Winter's records show emails dated August 12, 2005, August 15, 2005, September 14, 2005, November 5, 2005 (three separate communications on that date) and November 15, 2005. Particularly noteworthy is Mr. Varshine's August 12 email to Ms. Winter wherein he wrote, "Lisa just wanted to pass on my appreciation to you for working closely with me on the fan case."

ALA also expresses surprise that "Given the outcome of the Panel's decision at the 8 August 2005…meeting…[that] the NCC staff, for the 8 November Panel Review still, called for an increase in ceiling fans and light kits classification…" As mentioned, the Panel that met in August directed the staff to combine and analyze all available data and to report back in November with sample provisions consistent with NCC policies and guidelines. The report presented by the staff did exactly that. The sample provisions shown were indeed consistent with NCC policies and guidelines. So why would ALA be surprised?

ALA says, "The NCC staff…in our [ALA's] opinion, expanded the case beyond: 1) what was requested by the carrier and 2) the direction of the Panel for the purpose of increasing ceiling fan class ratings…" Everyone is entitled to their opinion, but in this instance ALA's has no basis in fact.

The carrier that requested the review of electric ceiling fans directed the NMFTA/NCC staff to research the products' transportation characteristics and to report same to a Classification Panel with sample provisions consistent with NCC policies and guidelines for the characteristics exhibited. As prescribed by the former ICC, and adopted by the STB, only upon an evaluation of the four transportation characteristics of density, stowability, handling and liability can class assignments properly be made.

Similarly, the Classification Panel that met on August 8, 2005 directed the staff to combine and analyze all available data relating to the transportation characteristics of ceiling fans and to report back in November with sample provisions consistent with NCC policies and guidelines.

No Change Has Been Made to the Classification of Electric Ceiling Fans

Following the August 8, 2005 Classification Panel meeting, Mr. Cutler informed Ms. Winter that ALA would be providing additional, significant data prior to the Panel meeting on November 8, 2005. In a scenario very similar to what took place in August, ALA's additional data was forwarded to Ms. Winter just before the Panel meeting on November 8. Again, there was insufficient time to do a proper analysis, and again the Panel took no action but to direct the staff to evaluate all of the information and report back with sample provisions consistent with NCC policies and guidelines at the Classification Panel meeting on February 6, 2006.

Candy

Comments from the National Confectioners Association (NCA) were prompted by the recent reclassification of candy, as named in NMFC item 39970. NCA criticizes

the NCC's notification process in connection with that reclassification as well as the data collected by the NCC.

The NCC Notifies Thousands of Shippers in Connection with its Classification Activities

The NCC's Section 5a Agreement requires that individual notice be provided to all shippers that participated in a corresponding NCC research survey as well as to all trade and professional associations identified by the staff as representing shippers of the involved product(s).[24] The NCC often goes beyond this requirement and individually notifies other shippers or shipper representatives that we believe may have an interest in a particular classification issue.

Since the current Section 5a Agreement was approved by the STB and became effective, the NCC has issued nine dockets, including Docket 2006-1 (February 2006), which was issued on December 8, 2005. The NCC has sent out a total of 20,073 individual notices relating to the classification proposals and review matters listed on those nine dockets to shippers, shipper associations and other persons identified by the NMFTA/NCC staff as possibly having an interest. This is in addition, of course, to the notice provided on NMFTA's website, where every NCC docket and public docket file is available for inspection by all interested persons, free of charge. Also, subscribers to the docket bulletin are mailed a copy of every docket.

The proposal to reclassify candy was listed on NCC Docket 2005-3 (August 2005), and the NCC mailed 1,922 individual notices in connection with the proposals and review matters on that docket alone.

[24] Article III, Section 3(c)(1)(ii).

With respect to its research surveys, the NCC has made 18,303 individual contacts with shippers and shipper groups since the current Section 5a Agreement became effective. And all active research projects are noticed on NMFTA's website, as well.

It should be evident that the NCC is not concealing its classification-making activities from shippers or shipper interests.

NCA was Notified at Every Phase of the NCC's Review and Reclassification of Candy

When researching the transportation characteristics of a product or product group, the NCC and the NMFTA/NCC staff endeavor to obtain accurate and representative information from both carrier and shipper sources. And that was the intent with respect to the NCC's review and reclassification of candy.

At the outset of that process, the NMFTA/NCC staff had identified NCA as being the primary group representing the candy industry. NCA confirms that, stating it "represent[s] over 90% of the [candy] industry and all its major companies."[25] And NCA has a long history of participating in the classification process.[26] For this reason, the NMFTA/NCC staff made certain that Larry Graham, President of NCA, was notified at every stage of the classification process so that the NCC and the candy industry could work cooperatively in this regard.

[25] NCA letter of December 2, 2005, at page 1.

[26] The NCC's files show NCA's involvement in the classification process dates back at least to 1972 in connection with the reclassification of hollow mold candy and candy canes. (See I & S Docket No. M-25955, Classification Ratings on Candy or Confectionery, I & S Docket No. 26068, Classification Ratings on Candy Canes, and later, Motor Class, Rating on Candy or Confectionery, 353 I.C.C. 314 (1977), in which NCA was a principal party opposing the reclassification of hollow mold candy.) In 1991, NCA protested the reclassification of candy canes. (See ICC Board of Suspension Case No. 71578, Increased Classification Rating on Candy Canes.) And NCA was a party to the subsequent formal complaint regarding the reclassification of candy canes. (See Formal Complaint No. 40777, et al., Bobs Candies, Inc. v. National Motor Freight Traffic Association, Inc., decided August 19, 1994 and served August 29, 1994.)

NCA was first notified when this matter was presented to an NCC Classification Panel as a commodity report; *before* the research survey on candy was initiated. That first notice was sent on March 4, 2004, 61 days prior to the Classification Panel meeting on May 4, 2004, where the matter was scheduled to be considered. (Review Matter K of Docket 2004-2 (May 2004).) NCA did not respond and did not participate.

The Classification Panel directed that research be conducted on candy. It was posted on NMFTA's website as an active research project, and on June 16, 2004 notice was mailed directly to NCA, requesting its assistance and the candy industry's participation in the survey. We received no response. Accordingly, a second notice and request was mailed to NCA on January 7, 2005 and, again, no response.

A report on the NCC's research survey detailing the information obtained as relates to the transportation characteristics of candy, including information from candy companies that participated in the survey, was presented to the Classification Panel that met on May 3, 2005. (Review Matter C of Docket 2005-2 (May 2005).) Notice of that meeting was sent to NCA on March 3, 2005, 61 days in advance. In the interest of full disclosure, a copy of the research report was included with that notice. Once again, NCA did not respond and did not participate.

Upon consideration of the facts presented, the Panel voted to docket a proposal to amend the description and packaging requirements for candy, and to increase the applicable class from 65 to 92.5.

The proposal, Subject 8 of Docket 2005-3 (August 2005), was considered by the Classification Panel that met on August 8, 2005. Notice was sent to NCA on June 9, 2005, 60 days in advance. A copy of Docket 2005-3, containing the full text of the

proposal and the complete staff report (analysis), detailing the information of record as obtained by the NCC, accompanied the notice. Yet again, the NCA did not respond and did not participate.

In all, NCA was notified *five times* of the NCC's activities relating to candy, and *five times* NCA ignored those notices.

The NCC Acted Based on the Best Information Available

Absent NCA's participation in the classification process, the Classification Panel that met on August 8, 2005 considered the information available on the record. This included carrier-supplied data, reflecting the transportation characteristics of actual candy shipments, as well as data furnished by interested shippers who responded to the NCC's survey.

All information in the NCC's possession—including the staff report (analysis) and the supporting raw data—was placed in the NCC's public docket file and posted on NMFTA's website 60 days prior to the Classification Panel meeting, so any interested person would have ample time and opportunity to inspect the record and challenge the accuracy or representativeness of the data, should there be cause.

The information of record related to a wide array of candy products, such as hard candy, taffy, lollipops, puffed candy, truffles and chocolate candy, including chocolate-covered cherries.

Based on this information the Classification Panel that met on August 8 approved the proposal, Subject 8 of Docket 2005-3, as docketed.

The NCC is Being Held Responsible for NCA's Own Inaction

It was only after the changes to the candy classification were approved and became effective that NCA finally contacted the NMFTA/NCC staff and indicated its interest. NCA claims it "has no record or recollection of ever receiving…notice" from the NCC.[27] That's very convenient.

Lisa Winter, the NMFTA/NCC staff member to whom the review of candy was assigned, has spoken by telephone with Larry Graham, NCA's President. Mr. Graham confirmed to Ms. Winter that the NCC's notices to NCA were addressed correctly and were sent to the attention of the correct individual, i.e., Mr. Graham. The U. S. Postal Service might not be perfect, and occasionally a piece of mail might get diverted, but it strains credibility to suggest that NCA never received any of the five, correctly addressed classification notices. What NCA did with those notices after they were delivered, however, remains an open question.

In any case, the NCC respectfully submits that it should not be held accountable for the deficiencies of another organization's office operation.

NCA suggests that "follow-up by the NCC via a phone call or email would have been helpful to ensure that notice of the proposal was actually received and that the recipients—in some cases, individuals who are not involved in transportation issues on a daily basis—appreciated the implications of the notice."[28] We can understand that the person who opens the mail might not comprehend the meaning of an NCC notification. But an organization's professional staff—in particular, the staff of an organization like

[27] NCA letter of December 2, 2005, at page 1.
[28] NCA letter of December 2, 2005, at page 4.

NCA, which has participated in the classification process over a period of more than three decades—should recognize the importance. All five classification notices that were sent to NCA were addressed to the attention of Mr. Graham, the Association's President, who should certainly understand what is and is not important to the candy industry.

The NCC's notices are clearly written as to what they pertain. If the recipient has any questions, though, the notices include the name, telephone number and email address of an NMFTA/NCC staff contact, as well as a fax number. A copy of the proposal notification letter that was sent to NCA is included as Attachment C, for the STB's reference.

Rather than take responsibility for its own business affairs, NCA would have the NCC telephone or email them so they could "appreciate the implications" of the *five* classification notices that were sent to them. But if NCA could not appreciate the implications of a notification letter, how could it appreciate the implications of an email? And the NMFTA/NCC staff does not have the capacity to follow-up on the hundreds or even thousands of individual notices sent out with each docket with a phone call. Such a requirement would be onerous and unnecessary. Other trade groups understand the importance of the NCC's notices, or if they don't they know enough to contact the NCC for clarification. When NEMA and ALA received classification notices regarding lamps, lighting fixtures and ceiling fans, they had no trouble appreciating the implications.

There is No Basis or Justification for Extending the Notification Period

NCA says:

> Even if NCA had received the letter notifying us of the first hearing, it would have been extremely difficult to collect the data needed in only 60 days, as required by the NCC. Notice of hearings should be at least 180

> days and shippers should have a minimum of 120-150 days to respond. Such time is a necessity for a thorough survey of our membership and is vital to getting the accurate data needed to assess a classification proposal. The speed and lack of transparency of this process reinforces the conclusion that the NCC is not truly interested in collaboration between shippers and the truckers it represents.[29]

The NCC first contacted NCA a full two months *before* the research survey on candy was initiated and then twice during the course of the survey. The purpose of these contacts was two-fold: 1) to give NCA—and the 90 percent of the candy industry that it represents—a heads-up that the NCC was reviewing the classification of candy; and 2) to enlist NCA's and the candy industry's assistance in developing accurate, representative information relative to the transportation characteristics of candy. The NCC's 60-day notification and disclosure schedule—predicated on the timeline prescribed by the STB[30]—does not apply to NCC research surveys. NCA would have had all the time it needed to collect the requested data.

As it is, the research survey on candy was initiated at the Classification Panel meeting on May 4, 2004, and notice of that meeting was sent to NCA on March 4, 2004. The proposal to amend the classification of candy was not considered by a Classification Panel until August 8, 2005, *17 months later!* [31] How could NCA expect the STB to conclude from the review and reclassification of candy that the NCC's Section 5a procedures do not give shippers sufficient time to develop their data?

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[29] NCA letter of December 2, 2005, at page 4.

[30] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* Appendix B.

[31] In accordance with the NCC's Section 5a procedures, all facts, data and evidence for proposals considered by the Classification Panel that met on August 8, 2005 were due on July 11, 2005. From March 4, 2004, when NCA was first notified, to July 11, 2005, when its information would have been due, is a time span of 16 months.

These facts notwithstanding, NCA asks the STB to require a six-month notification period for classification "hearings" with a four-to-five-month response period. (ALA has made the same request.[32])

Does NCA (or ALA) believe that shippers should have to wait six months to obtain a class *reduction?* Should amendments to NMFC packaging specifications, which might save shippers money on operational costs or reduce the incidence of claims, be delayed six months? Or should description changes to update or clarify the provisions of the NMFC require six months to be made?

During the previous Section 5a proceeding, more than one shipper group called on the STB to require 90 days' notice of classification proposals and access to the information in the NCC's public docket files. The STB rejected that idea in favor of 60 days:[33]

> We support a notice period that is sufficient to permit parties to formulate their response to a classification proposal without unduly delaying action on proposals. We find that 60 days' advance notice of proposals is needed, and should be sufficient, to enable parties to gather information and plan their participation in classification matters…

With respect to availability of the NCC's public docket files, the STB stated:[34]

> We think that 90 days is excessive and would unduly delay the processing of classification proposals. However…we find that 60 days' access to the reports, studies, and raw data underlying a classification proposal should be sufficient for interested parties to analyze and verify the data, without unduly delaying classification proposals. As for other material…that interested parties wish the NCC to consider in deciding a proposal, it

[32] See ALA letter of March 22, 2005 submitted in the lead proceeding, Ex Parte No. 656, at page 2, and ALA letter of December 1, 2005 submitted in the instant proceeding, at page 2.
[33] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at page 12.
[34] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at page 14.

would seem to us that 30 days should be a sufficient time for access… (Emphasis ours.)

The STB saw that 90 days would be excessively dilatory. Certainly, requiring *180* days' notice would cripple the NCC's ability to timely make changes to the NMFC.

We would also note that the NCC willingly accommodates shippers' scheduling needs. If an interested shipper or shipper group needs more time to develop relevant information, or if additional information should come to light after the deadline for the submittal of new facts, data or evidence, as set forth in the NCC's STB-prescribed notification and disclosure schedule, the NCC will give that shipper or shipper group the time it needs, even if that means having to disapprove and redocket a proposal or reschedule a classification review matter for consideration by a future Classification Panel. The NCC's reclassification of lamps and lighting fixtures is a case in point. As detailed herein, the NCC accommodated every scheduling request made by the lighting industry.

NCA Attempted to Use the Instant Proceeding to Intimidate the NCC

NCA contacted the NMFTA/NCC staff after the reclassification of candy became effective.[35] Included as an attachment to NCA's comments is a copy of a letter, dated November 11, 2005, from NCA's attorney to William W. Pugh, Secretary of the NCC.[36] The letter asks the NCC to: 1) reopen the proposal on candy, Subject 8 of Docket 2005-3; 2) stay the implementation of the class change; and 3) provide NCA's attorney with the "underlying information, studies, data, work papers and analyses provided to and relied upon by the NCC [in] the reclassification of candy."

[35] The amended classification provisions were published in Supplement 5 to NMF 100-AE and became effective on October 29, 2005.
[36] NCA letter of December 2, 2005, Exhibit 1.

NCA's attorney made it quite clear what NCA would do if the NCC did not comply:

> [T]he NCA is contemplating whether to file comments in the pending proceeding at the Surface Transportation Board concerning an investigation into the practices of the NCC (STB Ex Parte No. 656 (Sub-No. 1). The willingness of the NCC to work with NCA on the important issues raised in this letter is likely to have an impact on the NCA's decision to participate in that administrative proceeding.[37]

In other words, do as we ask or we will oppose your Section 5a Agreement and renewal of the NCC's antitrust immunity. Some people might call that an abuse of market power.

Unfortunately, this tactic is not unusual. Whenever the NCC approves a classification change in the face of shipper opposition the NCC risks this kind of retaliation by the involved shipper(s). For instance, it should be obvious that had the NCC not reclassified lamps and lighting fixtures, the lighting industry would never have opposed renewal of the NCC's antitrust immunity. Not once during the STB's previous review of the NCC's Section 5a procedures—which covered a period of some six years—did the lighting industry submit comments opposing collective classification-making. Only after the reclassification of lamps and lighting fixtures, which the lighting industry vigorously opposed, did it weigh in against the NCC.

With regard to the NCA attorney's specific requests, in keeping with the NCC's Section 5a procedures, the information, studies, data, work papers and analyses asked for were already included the NCC's public docket file, posted on NMFTA's website and freely available to all interested persons. Still, Lisa Winter of our staff promptly emailed those materials to the attorney along with proposal forms for changing the NMFC.

[37] NCA letter of December 2, 2005, Exhibit 1, at page 2.

However, reopening the proposal on candy and staying implementation of the classification change, as also requested, were not possible. The amended provisions were already in effect, and the NCC could not legally remove those provisions from the NMFC, just as it could not on its own volition remove any other classification provision that someone else might find objectionable.[38] Pursuant to the NCC's Section 5a Agreement, changes to the NMFC—except changes made necessary by law, by order of a regulatory body or for clarification—must be accomplished through the NCC's docket process, subject to the notification and disclosure requirements prescribed by the STB.

It was explained to NCA's attorney that the NCC and NMFTA/NCC staff were absolutely willing to work with NCA to develop additional data on the transportation characteristics of candy and to assist the candy industry in *expeditiously* establishing classification provisions as might be supported by that additional data; but that the NCC and NMFTA/NCC staff were powerless to stay the objectionable provisions.

Despite the NCC's stated willingness to work cooperatively with NCA and the candy industry, NCA has filed comments in the instant proceeding "urging" the STB not to renew the NCC's antitrust immunity.

The NCC is Cooperating with NCA to Address the Candy Industry's Concerns

NCA's comments in this proceeding do not alter the NCC's willingness to work with the candy industry.

[38] NCA's attorney stated that the amended classification provisions for candy had been "effective for only 13 days [and] granting a stay of the effective date would not be disruptive to the trucking industry…" While that may have been true, the provisions were nonetheless in effect, and the NCC could not just choose to remove them from the NMFC.

Both Lisa Winter and I have been advising NCA's attorney and NCA staff on the docketing of a new classification proposal for candy and the development of new information to support that proposal.

NCA says in its comments that "two candy companies who are members of the NCA had no alternative but to submit new classification proposals to the NCC to change the candy classification back to class 65…" [39] What NCA does not say, however, is that that was the *NCC's* idea.

NCA was clear that it wanted to docket a new, remedial proposal on candy immediately, i.e., on the next NCC docket, but was concerned that it did not have sufficient time to collect supporting data. In speaking with NCA's attorney in this regard, it became apparent that she did not fully understand the NCC's Section 5a procedures; specifically, the notification and disclosure schedule. As the NCC's Manager of Classification Development, I advised her on how NCA could use the NCC's procedures to its advantage. It was suggested that by having a candy company docket the new proposal NCA would have substantially more time to collect and submit information on behalf of the candy industry.[40]

I also advised NCA's attorney on the proposal itself, making suggestions that would allow the Classification Panel considering the proposal the widest possible latitude should the industry's data warrant a modification of the proposed class.

[39] NCA letter of December 2, 2005, at page 2.

[40] Pursuant to the notification and disclosure schedule, the proponent of a docketed proposal must have all of its facts, data and evidence in the public docket file no later than 60 days prior to the meeting where the proposal will be considered, while other interested parties have an additional 30 days to submit their facts, data and evidence. In the scenario I suggested, NCA would be an interested party to the candy company's proposal. It would thus have an additional month to collect its supporting data and still have the proposal considered at the next Classification Panel meeting.

NCA obviously followed my advice, with two candy companies coming forward to docket the industry's proposal.

NCA fails to acknowledge the extent of NCC cooperation and assistance on this matter. We are disappointed in NCA's lack of candor.

The NCC's Value Guidelines

Comments filed by the Freight Transportation Consultants Association, Inc. (FTCA) allege that the NCC "misuses" its value guidelines in assigning classifications. That allegation is unfounded.

As stated by the STB's predecessor, the Interstate Commerce Commission:

> The primary purpose of a freight classification is to assign each article or groups of articles with comparable transportation characteristics to a class. Assignments are made according to well known classification principles which are based upon distinctions relative to transportability. …[T]he classification is designed to reflect the characteristics of the commodity transported…[41]

Determining the transportability of a product or group of products is accomplished through an evaluation of four transportation characteristics, as prescribed by the ICC:[42]

1. Density;
2. Stowability, which includes excessive weight or excessive length;
3. Ease or difficulty of handling, which includes special care or attention necessary to handle the goods; and
4. Liability, which includes value per pound, susceptibility to theft, liability to damage, perishability, propensity to damage other commodities with which transported and propensity to spontaneous combustion or explosion. (Emphasis ours.)

[41] Charge For Shipments Moving On Order-Notify Bill Of Lading, N.M.F.T.A., 367 I.C.C. 330, 335 (1983).
[42] Investigation into Motor Carrier Classification, 367 I.C.C. 243, 258 and 367 I.C.C. 715-717 (1983).

The ICC found "that value per pound is relevant to the extent it helps measure potential liability and that it should be included under the liability factor."[43] Accordingly, the NCC's consideration of value per pound in the assignment of classes—as a component of the liability characteristic—is proper. The NCC evaluates value per pound only in conjunction with the other liability elements, as the ICC envisioned. Where those other elements, such as susceptibility to theft or liability to damage, present no substantial problems or concerns, value per pound becomes less significant.

The NCC's value guidelines do not carry the same "weight" in the assignment of classes as the NCC's density guidelines; the primacy of density having been well-established in numerous ICC and STB decisions. The value guidelines provide an indication of the upper value limits associated with the various classes, as determined using the density guidelines. To avoid any distortions that might be created over time by inflation—which could result in unfairly inflated classes—the NCC reviews its value guidelines biennially and adjusts them proportional to the change in the Producer Price Index (PPI), as published by the U. S. Department of Labor's Bureau of Labor Statistics.

The NCC's Use of Its Value Guidelines in the Post-ICCTA Environment Does Not Constitute an Abuse of Market Power

FTCA posits that, with the proliferation of liability limitations by individual motor carriers since enactment of the Interstate Commerce Commission Termination Act of 1995, the NCC's continued use of its value guidelines in assigning classifications is improper and constitutes an abuse of market power.

FTCA seems to suggest that the NCC somehow recognizes the unfairness of applying its value guidelines when the actual value of the product(s) being classified

[43] Investigation into Motor Carrier Classification, *supra,* at pages 248-249.

"exceeds the average limitation published in carriers' tariffs" because "[w]hen pressed by a shipper applicant…the NCC has on two known occasions relented and disregarded" the value guidelines.[44] The first of the two classification actions referred to by FTCA involved tobacco products, and the second involved human transporters, marketed under the name, Segway®. The implication is that in both instances the NCC bowed to shipper pressure and, realizing that in the eventuality of a loss or damage claim the claimant would never recover full value, the NCC assigned classes that were lower than what would have been called for under its value guidelines.

A review of the NCC's files on the two classification actions finds that it is true that *shipper representatives* raised the issue of carrier liability limitations and argued that, in light of those limitations, value per pound should not be considered in the assignment of classes. But the files also show that that never factored into the NCC's (actually, Classification Panels') decisions. As FTCA itself alludes with respect to the classification action on tobacco products, the NCC's General Counsel advised at the time that liability limitations are set by individual motor carriers as part of their rate structures and are, consequently, beyond the bounds of collective classification-making by the NCC or its Classification Panels.

With respect to the human transporters, the report (analysis) prepared by the NMFTA/NCC staff indicated that there was no evidence of record that the other elements comprising the liability characteristic presented any problems, and accordingly, the value per pound of the products was not a significant consideration.

Indeed, the fact is that the classes ultimately approved for tobacco products and human transporters were based on the same criteria the NCC always uses in its class

[44] FTCA Comments, at page 3.

assignments—regardless of whether there is active shipper participation—i.e., an evaluation of all four STB-recognized transportation characteristics: density, stowability, handling and liability (which includes value per pound).

We have already explained that, in the assignment of classes, the NCC does not apply its value guidelines in the same way it does its density guidelines. Numerous ICC and STB proceedings have recognized the primacy of density in classification-making. In addition, unlike density, value per pound is not in and of itself a transportation characteristic; it is only one component of liability, and therefore, must be evaluated in conjunction with the other liability elements. Where it is demonstrated that those other liability elements pose no substantial problems or concerns, value per pound becomes less significant. Thus, in those circumstances the NCC's value guidelines become less of a factor in the class assignment.

FTCA should understand all of this. For one thing, it acknowledges in its comments that the NCC's "Density Guideline has always been given greater weight in the classification process than the Value Guideline…"[45] For another, FTCA's comments include as an attachment the NCC's current Policies and Directives Pertaining to the National Motor Freight Classification, which contain both the density and value guidelines and detail how each is used by the NCC in the assignment of classes.[46]

The NCC's Policies are well publicized. They are posted on the NMFTA's website, are included in every public docket file and are otherwise available to anyone upon request, at no charge.

[45] FTCA Comments, at page 2.
[46] FTCA Comments, Appendix A.

The value guidelines, as they appear in the Policies, contain the following explanatory language for the benefit of interested persons:

> Unlike density, value per pound is not in and of itself a separate transportation characteristic. Pursuant to the decisions in Ex Parte No. MC-98 (Sub-No. 1), *Investigation into Motor Carrier Classification*, value per pound is only one component of the liability characteristic. Accordingly, information relating to value per pound must be analyzed in conjunction with the other liability elements, i.e., susceptibility to theft, liability to damage, propensity to damage other freight, perishability, and propensity to spontaneous combustion or explosion. Where those other liability elements are found to present no substantial problems or concerns, value per pound is of less significance.
>
> **Consequently, the value guidelines cannot be viewed as forming a matrix with the density guidelines, where one is measured against the other to arrive at the appropriate class representing an "average" of the two factors. Rather, the value guidelines provide an indication of the upper value limits associated with the various classes, as determined using the density guidelines.** (The bold face type appears in the guidelines themselves, for emphasis.)

There is No Basis for Requiring the NCC to Amend Its Policies

FTCA asks that the STB impose, as a condition for renewal of antitrust immunity, the following additional language to the NCC's Policies, as relates to the value guidelines:

> [W]here the record reveals that motor carriers generally maintain a limit on their liability at a fixed, uniform level, such as $25 per lb., that value shall be observed as the actual value of a commodity when applying the Value Guideline.[47]

The flaw in FTCA's reasoning in making that request is that there is no "fixed, uniform level" for these liability limits; not at $25.00 per pound or any other dollar amount.

There is no standard liability limitation in the motor carrier industry for loss or damage claims. As already noted herein, these limitations are established on an

[47] FTCA Comments, at page 4.

individual carrier basis. Moreover, as FTCA's own exhibit clearly shows,[48] there is tremendous variation in these limits from carrier to carrier. The FTCA's analysis of 63 LTL carriers (we count 62) from 2001 reveals value limits ranging from $0.05 to $50.00 per pound. Just under half the carriers listed limit their liability to $25.00 per pound (some with certain conditions), but the remaining carriers limit their liability to some other dollar amount(s). It is apparent that the level of liability limitations is neither fixed nor uniform.

Some carriers have a blanket limitation per pound, with or without a limitation per shipment. Some carriers have a sliding scale of value limits dependent on the applicable class; the lower the applicable class, the lower the limitation. And some carriers have established specific value limits for certain product groups, such as used machinery.

We recently polled several of our member carriers to get a more up-to-date picture. Our finding was essentially the same as the FTCA's: there is no standardization.

Here are a few examples of what we found:

	Liability Limitation
Carrier A	$25.00 per pound, maximum $125,000 per shipment
Carrier B	$10.00 per pound per package, maximum $100,000 per shipment Used products – $.50 per pound FAKs – Sliding scale from $1.00 to $10.00 per pound per package
Carrier C	$10.00 per pound Contracts range from $5.00 per pound to full value, depending on the contract
Carrier D	$25.00 per pound, maximum $25,000 per shipment
Carrier E	Sliding scale based on applicable class, from $2.00 to $35.00 per pound
Carrier F	$2.50 per pound, maximum $100,000 per shipment
Carrier G	$5.00 per pound

[48] FTCA Comments, Appendix B.

One NCC member said, "I do not believe there is a standard liability limitation in our industry. It appears that the liability limitation covers the overall…spectrum, from very low to very high."

Another member agreed with FTCA to the extent that $25.00 per pound "is a fairly common LTL liability limit." *However*, that same member went on to say that the $25.00 per pound limit "is far from standard."

There are over 1,100 motor carriers of all sizes that participate in the NMFC. The relative handful of carriers surveyed by the NCC and those included in FTCA's exhibit do not begin to scratch the surface. Frankly, we don't have a clue what liability limitation, if any, each and every NMFC participant has published in their own tariffs, rate schedules or rules. And we dare say neither does FTCA.

Furthermore, FTCA overstates matters when it says "the courts [have permitted] motor carriers to impose maximum liability limitations in their tariffs without a shipper's written agreement."[49] Just as there is no uniform motor carrier liability limitation, courts have not been uniform in their findings regarding the applicability of those limitations. Decisions have varied from circuit to circuit, with some courts requiring that carriers provide shippers *actual notice* of any liability limitation. Where actual notice has not been given, those courts have ruled that the limit on liability published by the carrier is inapplicable.

NASSTRAC's Comments

The comments filed by the National Small Shipments Traffic Conference, Inc. (NASSTRAC) are largely a restatement of the misrepresentations and unsupported allegations it made in the lead proceeding, Ex Parte No. 656, to which the NCC has

[49] FTCA Comments, at page 2.

already responded.[50] But to the extent that NASSTRAC continues to distort the NCC's activities and practices we will respond once again.

The Classification System Does Not Favor Class Increases

NASSTRAC claims:

> The current system is biased in favor of increases in commodity class ratings due to the way classification matters are initiated. A simple letter or email from a carrier member of the…NMFTA, NCC's parent organization, is apparently enough to initiate a proceeding. Carriers have no incentive to request initiation of a proceeding that would lead to a reduced commodity class rating… Because most proceedings are initiated by carriers, proceedings in which changed freight classifications are sought are more likely to involve proposed increases in class ratings than proposed decreases.[51] (Emphasis theirs.)

NASSTRAC offers no evidence to back-up this allegation.

Anyone may docket a proposal to amend the provisions of the NMFC—except NMFTA/NCC staff—and the NCC provides suitable forms for submission of proposals. A proposal may seek almost any amendment to the NMFC,[52] and many do not involve a class change at all.

We have reviewed the NCC's classification actions during 2005, resulting from consideration of the proposals listed on Dockets 2005-1, 2005-2, 2005-3 and 2005-4. We find that 60.98 percent of those actions involved packaging, clarification or updating, including cancellation of obsolete provisions. In other words, just under two-thirds of the changes approved by the NCC in 2005 involved classification issues *other than* the adjustment of classes. By comparison, 13.41 percent of the changes approved by the NCC in 2005 involved class increases only (i.e., without some class reductions).

[50] See Reply Comments and Rebuttal Comments of National Motor Freight Traffic Association, Inc., and the National Classification Committee, dated April 1, 2005 and April 21, 2005, respectively.
[51] NASSTRAC Comments, at pages 1-2.
[52] The NCC is prohibited from entertaining certain proposals, such as those affecting the application of a released value classification.

Looking ahead to Docket 2006-1, which will be considered by the Classification Panel that meets on February 6, 2006, 61.54 percent of the proposals listed involve packaging, clarification or updating (without any class changes),[53] while just 11.54 percent would result in a class increase only (without some class reduction).

The Classification System is Not Biased Against Shippers

NASSTRAC tries to make a point that "NMFC member carriers pay nothing for NCC actions they request." [54] The fact is that *nobody* pays to request a classification action. There is no fee to docket a proposal, the proposal forms are free and NMFTA/NCC staff assistance in crafting a proposal, when requested by a shipper or any interested person, is free. And as to NASSTRAC's complaint that shippers must "provide extensive justification," we would respond that the only information shippers need provide is that relating to the transportation characteristics of the subject product(s). And such information—packaging, dimensions, weights, etc.—should be readily available to shippers of the product(s).

The NCC's Section 5a Agreement does stipulate that if a shipper wants the NMFTA/NCC's staff to conduct a research survey on its behalf, that assistance is offered on a direct-cost reimbursement basis. But at this writing no shipper has found the need to make such a request. Shippers who file a proposal with the NCC generally need no help from the NMFTA/NCC staff to collect and assemble their supporting data. After all it is *their* data, and they know best how and where to get it.

[53] One packaging proposal has since been withdrawn by the proponents.
[54] NASSTRAC Comments, at page 2.

We are curious by NASSTRAC's statement that "most shippers prefer not to initiate [classification] proceedings; they get involved in proceedings reluctantly..." [55] Has NASSTRAC spoken to most shippers?

The fact is that it is not unusual for shippers to participate in the classification-making process proactively and without reservation. They might seek a specific NMFC description to clarify the classification of their product(s), they might propose a new packaging option, or they might believe that the transportation characteristics of their product(s) warrant a reduced class.

Of course, if a shipper or shipper group objects to a proposed classification change, it may likewise elect to participate in the classification-making process, in writing and/or in person, and submit facts, data and evidence supporting their position.

That is precisely what the open, public classification procedures are all about.

The NCC Provides Wide Notice of Its Classification-Making Activities and Strives to Educate the Shipping Public About the Classification System

NASSTRAC says "most shippers are unaware of NCC activities." [56]

The NCC's Section 5a Agreement, as approved by the STB, sets forth strict notification and disclosure requirements. All docketed proposals for amending the NMFC as well as all classification review matters are noticed in the NCC's docket bulletin at least 60 days in advance of the public meeting where they will be considered. The docket bulletin is mailed to proponents of the classification proposals listed therein, to all members of the NCC and to all subscribers to the docket. The docket is also posted on the NMFTA's website for immediate online access by any interested person, free of charge.

[55] NASSTRAC Comments, at page 2.
[56] NASSTRAC Comments, at page 2.

In addition to specifying the date, time and location of the public meeting, the docket contains the relevant staff report (analysis) for each proposal, which contains the full text of the proposal along with the name, telephone number and email address of the NMFTA/NCC staff member to whom it is assigned.[57] The docket also explains how to access the public docket files.

The docket lists, too, the classification review matters that are scheduled to be considered at the public meeting along with the name, telephone number and email address of the NMFTA/NCC staff member to whom each review matter is assigned. Review matter reports prepared by the staff are not included with the docket bulletin, but in the interest of full disclosure, the NCC does post all of the reports on the NMFTA/NCC website concurrent with the issue of the docket bulletin. This is significant because, while a classification review matter is not a docketed proposal, it might lead to a proposal. And it is the NCC's aim to encourage shipper participation at this very early stage in the classification-making process.

At the same time the docket is issued, individual notice of docketed proposals and classification review matters is mailed directly to all shippers that participated in any corresponding NCC research as well as to all trade or professional associations identified by the NMFTA/NCC staff as possibly representing shippers who might have an interest. The NCC also routinely provides individual notice to shippers that have *not* participated in any research activity but have nevertheless been identified as possibly having an interest.

[57] The NCC's Section 5a Agreement allows for summaries of the staff's reports (analyses) to be included with the docket bulletin, but the NCC has chosen to include the reports themselves with the full and complete staff analysis of each proposal.

As already mentioned herein, since the current Section 5a Agreement was approved by the STB and became effective, the NCC has sent out a total of 20,073 individual notices relating to classification proposals and review matters to shippers, shipper associations and other persons identified by the NMFTA/NCC staff as possibly having an interest.

Beyond the notice provided on classification proposals and review matters, since the current Section 5a Agreement became effective, the NCC has made 18,303 individual contacts with shippers and shipper groups in connection with its research surveys.

The NCC is also committed to educating shippers and the entire transportation community about the NMFC and the classification process. Information about the NCC and NMFC is posted on the NMFTA website, including: the NCC's Section 5a procedures; the arbitration procedures with a list of available neutral arbitrators; the NCC's Policies and Directives Pertaining to the National Motor Freight Classification, which contain the density and value guidelines; and forms for proposing changes to the NMFC.

Furthermore, NMFTA/NCC staff conducts classification seminars to promote better understanding of the NMFC and the classification-making process. Offered throughout the country and open to anyone, these seminars provide step-by-step instruction in the use of the NMFC as well as insight into how class assignments are determined and how changes to the NMFC are made. Since 1997, when they began, more than 1,500 individuals (a conservative estimate) have attended these seminars, and over 75 percent of those attending have been shippers and shipper consultants.

Information about the seminars, including the annual schedule and a registration form, is on the NMFTA website.

NMFTA/NCC staff also conducts seminars for individual shippers, carriers and others in the transportation community, tailored to the specific needs of the particular company.

The NCC Does Not Unduly Burden Shippers With Its Requests for Information

NASSTRAC says:

> In prior comments, NCC attacked, but did not deny, NASSTRAC's statement that information is routinely sought which is not necessarily relevant to the inquiry initiated by a carrier member. Nor did NCC rebut NASSTRAC's statement that providing the requested information may impose severe burdens on shippers.[58]

It would appear that NASSTRAC did not read our previous Reply Comments, where we indeed denied its first point and rebutted its second.

NASSTRAC had used a hypothetical example involving Revere 10-inch frying pans to illustrate its claim that the NCC "routinely" seeks information from shippers that is not relevant to the particular classification inquiry. We debunked that hypothetical in our previous Reply Comments, exposing it as ludicrous.[59] And we see no good reason to repeat ourselves here.

To further illustrate its claim, though, NASSTRAC now refers to the NCC's real-world review of electric ceiling fans. We have already detailed herein the facts surrounding the classification review of ceiling fans, but in this context, we believe more needs to be said.

[58] NASSTRAC Comments, at page 3.
[59] See Reply Comments of National Motor Freight Traffic Association, Inc., and the National Classification Committee, dated April 1, 2005, Reply Statement of Joel L. Ringer, at pages 14-15.

We should mention that, although NASSTRAC's attorney represents ALA in this matter, NASSTRAC itself has not been party to the review of ceiling fans. NASSTRAC has furnished no data, has offered no comments (except in this proceeding) and no one has attended the public meetings where this matter has been discussed on its behalf.

NASSTRAC also misstates the carrier directive that initiated the classification review.

Research was requested by a member carrier who noted that the current provisions for ceiling fans, NMFC item 61870, apply only on ceiling fans without lighting fixtures, whereas many ceiling fans today are equipped with lighting fixtures. In those instances it is necessary to invoke Item (Rule) 422, governing the "Classification of Combined Articles," which the carrier observed can be cumbersome.

NASSTRAC's retelling of events is essentially correct up to this point. However, NASSTRAC leaves out the very important fact that the carrier's request specifically directed the NMFTA/NCC staff to research the transportation characteristics of ceiling fans so that the NCC would have the information it requires to determine what action, if any, to take. And this the staff did.

NASSTRAC suggests a simplistic approach where the NCC would propose amending item 61870 to apply on ceiling fans with or without lighting fixtures, without bothering to research the products' transportation characteristics. Is NASSTRAC really suggesting that the NCC reclassify products without first ascertaining their transportation characteristics? Would that not constitute an abuse of market power by the NCC?

According to NASSTRAC, "Such a change would have been supported by the nation's leading ceiling fan manufacturers."[60] (ALA likewise "would have agreed to it."[61]) However, that is not the standard of reasonableness. Rather, the change would have to be supported by an objective evaluation of all four transportation characteristics of ceiling fans. Would NASSTRAC (or ALA) be as cavalier if the characteristics justified a class reduction? And what would the STB's reaction be if it learned that the NCC was reclassifying products without first evaluating the relevant transportation characteristics?

We believe we know the answers to both questions.

Just as NASSTRAC criticizes the NCC for requesting pertinent information from shippers and shipper interests, it criticizes the NCC for ignoring pertinent information from shippers and shipper interests. NASSTRAC alleges "much of the density data first submitted for several hundred thousand fan shipments was ignored by NCC because shipment length, width, height and weight data had not been included."[62] This is not true.

All of the information submitted on behalf of ALA was considered. However, two ceiling fan companies provided density *averages*, instead of individual density figures. Those averages could not be combined with other companies' individual densities, since to do so would have rendered the resulting analysis inaccurate.

NMFTA/NCC staff did ask NASSTRAC's attorney, as representative of ALA, to confirm that the submitted density figures actually related to ceiling fans *as tendered for shipment.* For reasons that should be obvious, information relating to products as

[60] NASSTRAC Comments, at page 4.
[61] ALA letter of December 1, 2005, at page 3.
[62] NASSTRAC Comments, at pages 4-5.

actually packaged and presented to carriers for shipment is the truest indicator of transportability. Regardless, all of the individual density figures provided on behalf of ALA were included in the staff's analysis.

To ensure that reasonable provisions are established, all reclassifications by the NCC must be based on an evaluation of the four STB-recognized transportation characteristics: density, stowability, handling and liability. It is, therefore, incumbent upon the NCC to collect accurate and representative information relating to those characteristics.

To facilitate shipper input, the NMFTA/NCC staff includes a straightforward, easy-to-fill-out questionnaire and postage-paid return envelope with each research solicitation. The questionnaire is designed to elicit specific information relating to all four transportation characteristics and asks questions that help assure that the data submitted is representative and relates to goods moving via NMFC-participating carriers.

Examples of our questionnaires were included in our Reply Comments in the lead proceeding.[63] They are relatively short and to the point, and they are designed to be anything but "burdensome." Furthermore, if it is too time-consuming or is otherwise not feasible for a shipper to provide specific information on every model of the involved product it might ship, data on a representative sampling would certainly suffice.

NASSTRAC's Comments Respecting the NCC's Reclassification of Lamps and Lighting Fixtures are Irresponsible

NASSTRAC concedes that it was not involved in any way with the reclassification of lamps and lighting fixtures. And as no one from NASSTRAC was in attendance at the public meetings where the subject was considered, NASSTRAC has no

[63] See Reply Comments of National Motor Freight Traffic Association, Inc., and the National Classification Committee, dated April 1, 2005, Reply Statement of Joel L. Ringer, Attachment B.

firsthand knowledge whatsoever as to what was (or was not) discussed or what facts were (or were not) considered.

NASSTRAC nevertheless feels obliged to share its (baseless) opinion in this regard. Accepting the lighting industry's version of what transpired, NASSTRAC says "it appears likely that the data of the American Lighting Association members was ignored by the NCC…" [64]

We have gone into considerable detail herein on the reclassification of lamps and lighting fixtures. As noted, the lighting industry provided the results of a survey it conducted, which confirmed the conclusions of the NCC's research. But the lighting industry did not furnish any of the underlying raw data. The NCC could not ignore data that was never presented.

We respectfully submit to the STB that it is irresponsible of NASSTRAC to question the NCC's behavior on a classification action of which it has no actual knowledge.

NASSTRAC Fails to Demonstrate Bias in the NCC's Classification Standards

According to NASSTRAC, "Shippers also regard the standards employed by the NCC as biased in favor of carriers." [65] (Emphasis theirs.) And NASSTRAC refers to Item (Rule) 422, "Classification of Combined Articles," as evidence of that bias.

There are two flaws in NASSTRAC's reference to Item 422. First, Item 422 is a rule of tariff application, not a classification standard. It provides direction to users of the NMFC when the product being shipped is a combination of two or more articles, and the

[64] NASSTRAC Comments, at page 5.
[65] NASSTRAC Comments, at page 6.

combination is neither specifically named in the NMFC nor embraced by a general, or "NOI," description, such as an electric ceiling fan equipped with a lighting fixture.

Second, Item 422 does not apply to the example given by NASSTRAC. A pallet load of bowling balls that also has a box of ping-pong balls on it constitutes a mixed package (more accurately a mixed pallet), not a combination article. So Item 422 has no application, and the bias NASSTRAC alleges does not exist.

The NMFC rule that actually applies on mixed packages is Item 640, "Mixed Shipments." Under Item 640, Sec. 3(b), the bowling balls on the pallet would be classified as bowling balls, at class 70, and only the lone box of ping-pong balls would be subject to the class 500 for ping-pong balls. The rule further provides that the weight of the pallet itself would move at the lower class, 70.

NASSTRAC's error in this regard reveals its lack of familiarity with the provisions of the NMFC and their proper application.

There is No Bias in the NCC's Density Guidelines

NASSTRAC alleges bias in the NCC's density guidelines because they are "non-linear."[66] The NCC's density guidelines originated in ICC proceedings and have been found reasonable in numerous ICC and STB proceedings. A more complete discussion of this issue was provided by William W. Pugh, Executive Director of NMFTA and Secretary of the NCC, in our Reply Comments in the lead proceeding,[67] and in the instant proceeding he has addressed the issue once again.[68]

[66] NASSTRAC Comments, at pages 7-8.
[67] See Reply Comments of National Motor Freight Traffic Association, Inc., and the National Classification Committee, dated April 1, 2005, Reply Statement of William W. Pugh, at pages 7-9.
[68] See Statement of William W. Pugh herein, at page 7.

NASSTRAC's Allegation of "Possible" Bias by the NCC and NMFTA/NCC Staff is Unfounded

NASSTRAC repeats its attack upon the honesty, integrity and professionalism of the NMFTA/NCC staff, reasoning that since they "are employed by the trucking industry…and are answerable to NMFTA's…motor carrier members…the possibility of bias cannot be ruled out."[69] (Emphasis ours.)

The NMFTA/NCC staff assists the NCC in its task of maintaining the NMFC and ensuring that individual commodity classifications accurately represent the transportability of the products to which they apply. The staff performs this function honestly, fairly and to the best of its ability. NASSTRAC's bare allegation of the *possibility* of staff bias is without foundation and nothing less than insulting.

NASSTRAC's allegation of *possible* bias on the part of the NCC itself is similarly unfounded. The NCC can neither create nor change its classification procedures or standards without STB approval. Indeed, the NCC's classification-making standards were prescribed by the ICC and have been adopted by the STB. The NCC's current Section 5a procedures were prescribed and approved by the STB.

And any change to the provisions of the NMFC approved by the NCC—a class increase, class reduction or whatever—must be supported and justified by the facts, data and evidence in the public record as they relate to the classification-making standards recognized by the STB. Moreover, there are protections built into the classification system to make certain the NCC and NMFTA/NCC staff do not act improperly. All classification changes are subject to review by a neutral arbitrator, the STB or the courts.

[69] NASSTRAC Comments, at page 9.

NASSTRAC and the Other Shipper Commentators Have Not Availed Themselves of the "Reforms" Already Put in Place by the STB

The stated goal of NASSTRAC and the other shipper commentators in this proceeding is termination of the NCC's antitrust immunity. But short of that, further conditions are requested, and NASSTRAC calls upon the STB to "consider multiple reforms" to the NCC's Section 5a procedures. However, NASSTRAC carefully avoids much discussion of the "reforms" already put in place by the STB, while NEMA and ALA misstate them.

Significant changes were ordered by the STB as conditions of its approval of the NCC's current Section 5a Agreement to "improve the classification process by eliminating the perception of bias."[70] (Emphasis ours.) Arbitration was arguably the most significant of those changes.

NASSTRAC was one of the principal proponents of arbitration. In comments it filed with the STB, NASSTRAC "urge[d] the establishment of an arbitration option for affected shippers that are dissatisfied with NCC Action."[71]

The STB subsequently determined that:

> [T]he best way to provide the necessary assurance of fairness in the collectively established classification process is to require the NCC to provide interested parties with an option of review by a neutral arbitrator.[72] (Emphasis ours.)

NASSTRAC now appears to be uninterested in that option.

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[70] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at page 23.

[71] See Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, Opening Comments of National Small Shipments Traffic Conference, Inc., and the Health and Personal Care Distribution Conference, Inc., dated April 11, 2000, at page 41.

[72] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at page 19.

Since the NCC's current Section 5a Agreement became effective, a total of 147 classification proposals have been considered and acted upon by the NCC and its Classification Panels. Arbitration was not sought in connection with any of these actions; not by NASSTRAC or anyone else.[73] In fact, as already discussed herein, the lighting industry pointedly eschewed arbitration. And no one has challenged any classification action to the STB via protest or complaint.

How can NASSTRAC and other commentators in this proceeding persist in arguing that the NCC's activities and practices are biased against shippers when none of them have found cause to invoke the safeguards *already in place* to assure fairness in the collective classification-making process, including safeguards that NASSTRAC itself advocated?

Shippers Support the NCC and the Classification System

This proceeding was instituted by the STB in response to shipper comments filed in the lead proceeding, Ex Parte No. 656, Motor Carrier Bureaus—Periodic Review Proceeding, opposing renewal of the NCC's antitrust immunity. The STB observed, "Almost all of the comments from businesses were from entities connected with the business of producing or selling lighting or lighting fixtures."[74] Letters were also submitted by several members of Congress at the behest of lighting industry shippers.[75]

[73] Reconsideration by the full NCC, a procedure similar to the old NCC appeal process and available as an alternative to arbitration, has been requested by shipper groups on two occasions. In the first instance, the party requesting reconsideration withdrew its request. In the second, the NCC acceded to the shippers' request to disapprove the classification action and cooperate on further research.

[74] Surface Transportation Board Decision, STB Ex Parte No. 656 (Sub-No. 1), Investigation into the Practices of the National Classification Committee, *supra*, at page 2.

[75] Congressmen Harold Ford, Bart Gordon, Pete Sessions and Jim Cooper, and Senator Kay Bailey Hutchison sent letters to the STB.

In other words, the instant proceeding is essentially a response to comments and letters from, or on behalf of, a single shipper group—the lighting industry—and resultant of a single NCC action—the reclassification of lamps and lighting fixtures.

Unable to prevail on the merits, the lighting industry seeks to demonize the NCC and the collective classification-making process. It has renewed its call for terminating the NCC's antitrust immunity, again pointing to the reclassification of lamps and lighting fixtures and now the NCC's ongoing review of electric ceiling fans. NCA's opposition to continuation of the NCC's antitrust immunity—new in this proceeding—stems, similarly, from the NCC's recent reclassification of candy. We have responded herein to these shipper groups as well as to NASSTRAC and the other commentators.

These comments, however, do not represent the views and beliefs of all shippers or shipper interests. Appended hereto as Attachment D are comments from several shippers and shipper advocates *supporting* the NCC and the collective classification-making process.

Weber-Stephen Products Co., manufacturer and shipper of Weber grills, participated earlier this year in the reclassification of charcoal grills. (Subject 16 of Docket 2005-2 (May 2005).) Michael J. Sweeney, Weber's Vice President of Logistics, describes his experience this way:

> We worked closely with the committee [NCC] and we were very pleased with the outcome. We found the process to be fair and the committee members to be extremely professional. The committee was very helpful in explaining the process…with updates regarding the docket. In addition, all inquiries were answered in a timely fashion. More importantly, <u>I never sensed any bias throughout the process</u>. (Emphasis ours.)

Bob Oda, Corporate Traffic Manager for DESA, LLC, a manufacturer and shipper of gas heating products and tools, attended one of the NMFTA/NCC public classification

seminars in the spring of 2004, which led to his involvement in the reclassification of portable gas or kerosene heaters. (Subject 9 of Docket 2004-4 (November 2004).) More recently he has participated in the NCC's research survey on gas fireplace log sets. His letter goes into great detail on his experiences with the NCC and NMFTA/NCC staff, but one sentence might sum it up best:

> I believe that [the] National Classification Committee, for me, has helped to "even the playing field."

Publications International, Ltd., filed a proposal this year to amend the provisions for stationery or stationery sets, including ink pens, NOI, from a single class 100 to density-based classes. (Subject 12 of Docket 2005-3 (August 2005).) In fact, it is noteworthy that *Publications International proposed the very same density scale that the lighting industry finds so objectionable.* Robert Griffis, Shipping and Orderfill Manager for Publications International, concludes:

> I am very happy with the current classification system, and in my experience, it appears to be fair for both shipper and carrier… I was impressed with the ease of both proposing and effecting change to the NMFC to make it more applicable to our product. I believe we have a good system in place for classifying and rating product in the shipping industry. (Emphasis ours.)

With respect to packaging, Edward A. Church, Executive Director of the International Safe Transit Association (ISTA), an association of manufacturers, carriers, packaging suppliers and testing laboratories, observes:

> Working very closely with NCC for over 10 years on Packaging Performance Test Standards…has shown ISTA, first hand, the excellent quality, knowledge and abilities of the NCC staff members.
>
> The excellent efforts of the NCC to provide a fair process that brings an evenhanded approach between shippers and carriers in the form of the current classification system must be allowed to continue. Also, to insure that this system works, the NCC must continue to be provided with their antitrust immunity. (Emphasis ours.)

Bruce D. Hocum, President of Rubenstein Logistics Services, Inc., has represented shipper interests before the NCC on many occasions since the early 1970s and most recently in connection with the reclassification of water softeners. (Subject 9 of Docket 2005-4 (November 2005).) Addressing some of the criticisms leveled at the NCC and the classification system, Mr. Hocum says:

> [M]ember carriers of the NCC have been extremely helpful…
>
> [T]here have been several major shipper organizations that…have been attacking the present classification system. I have…listened to some of the arguments. All of these arguments are totally unfounded in my opinion.

Raynard F. (Ray) Bohman, Jr., a nationally known and respected transportation consultant and author who has represented shipper interests before the NCC for literally decades—most recently on the NCC's review of blackboards, corkboards and whiteboards (Review Matter B of Docket 2005-4 (November 2005))—notes:

> [T]he whole [classification] process has provided interested shippers with more factual information than they ever had before and has done so in a more timely manner. I have seen nothing to indicate that the full NCC or its Classification Panels have become less transparent in their dealings with the shipping public.

With regard to NCC members, Mr. Bohman goes on to say:

> From what I have observed over the years…members of the NCC take their role very seriously and lean over backwards to try to resolve each proposal…in a fair and equitable manner, given the narrow parameters in which they are obligated to operate under. <u>And they do so at the risk of having some shippers taking it out on their companies</u>, as their votes can be made available on request. (Emphasis ours.)

These comments, all addressed to the STB, are included in their entirety in Attachment D, for the Board's review.

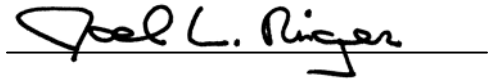
The NCC's Antitrust Immunity Continues to be in the Public Interest

As demonstrated in the lead proceeding, and as demonstrated again herein, the NCC has strictly adhered to its Section 5a Agreement, as approved by the STB. Moreover, the classification changes that have been approved by the NCC have been made in full accord with STB-recognized classification principles and criteria.

Comments from shippers and shipper advocates, included as Attachment D, evidence that the STB-approved classification procedures are working well and that the collective classification-making process continues to be in the public interest.

For these reasons, we respectfully submit that there has been no abuse of market power by the NCC, nor is there any basis for further changes to the NCC's Section 5a Agreement.

I, Joel L. Ringer, state that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on December 22, 2005.



JOEL L. RINGER

ATTACHMENT A

PROPOSAL TO AMEND THE CLASSIFICATION OF LAMPS AND LIGHTING FIXTURES

Present Classification Provisions:

Item No.	Description	Class
	LAMPS OR LIGHTING GROUP: subject to item 109000	
109400	**Lamps,** see Notes, items 109401 and 109402, **viz.:**	
	Chain or Swag Lamps, including **Rain Lamps;**	
	Floor Standing Lamps, with or without integral tray, also in Package 817;	
	Lamps, NOI, also in Packages 794, 817, 1424, 1467, 2204 or 5F;	
	Oil Lamps or Torches;	
	Parts, lamp or lantern, NOI;	
	In boxes, subject to Item 170 and having a density in pounds per cubic foot of:	
Sub 1	Less than 2, see Note, item 109403	250
Sub 2	2 but less than 4, see Note, item 109403	200
Sub 3	4 but less than 8, see Note, item 109403	125
Sub 4	8 but less than 12, see Note, item 109403	92.5
Sub 5	12 or greater, see Note, item 109403	70
109401	NOTE—One incandescent or fluorescent lamp (bulb) for each socket may be included in same box with lamp.	
109402	NOTE—The quantity of globes, shades, reflectors or similar devices must not exceed the number required to equip the articles with which shipped.	
109403	NOTE—When lamps and their complement of globes, shades or reflectors are in separate packages, the density for determining the applicable provisions must be the result of the division of the total weight of all packages by the total cubage (cubic displacement) of all such packages.	
109810	**Lighting Fixtures,** see Notes, items 109811, 109812, 109813 and 109814, **viz.:**	
	Hanging or Pendant Lighting Fixtures, other than glass chandeliers;	
	Fluorescent or High Intensity Discharge (HID) Lighting Fixtures, NOI, with equipment of transformer or ballast, see Note, item 109815, also in Packages 220, 233, 790, 919, 1406, 2228, 2312 or 2477; see Note, item 109816;	
	Housings, recessed incandescent lighting fixture;	
	Lighting Fixtures, NOI;	
	Parts, NOI;	
	In boxes or crates, subject to Item 170 and having a density in pounds per cubic foot of:	
Sub 1	Less than 4, see Note, item 109817	200
Sub 2	4 but less than 8, see Note, item 109817	100
Sub 3	8 but less than 12, see Note, item 109817	85
Sub 4	12 or greater, see Note, item 109817	70
109811	NOTE—One lamp (bulb) for each socket may be included in same box with fixture.	

Present Classification Provisions: — Concluded

Item No.	Description	Class
109812	NOTE—The quantity of globes, shades, reflectors or similar devices must not exceed the number required to equip the articles with which shipped.	
109813	NOTE—Applies only on lighting devices designed for permanent wiring to walls, ceilings, floors, posts or other similar mountings.	
109814	NOTE—Does not apply on electric lighting fixtures equipped with posts or poles exceeding ten feet in length. Provisions for such lighting fixtures are found within items 161150 through 161240.	
109815	NOTE—Accompanying equipment of iron or steel or plastic reflectors may be in packages.	
109816	NOTE—When in shipments of 10,000 pounds or more, fixtures packaged with form-fitting expanded polystyrene end caps may be shrink wrapped on pallets with polyethylene shrink film of 5 mil thickness completely shrouding fixtures and pallet. Shipments to be loaded by consignor and unloaded by consignee.	
109817	NOTE—When lighting fixtures and their complement of globes, shades or reflectors are in separate packages, the density for determining the applicable provisions must be the result of the division of the total weight of all packages by the total cubage (cubic displacement) of all such packages.	

Proposed Classification Provisions:

Item No.	Description	Class
	LAMPS OR LIGHTING GROUP: subject to item 109000	
109400	**Lamps,** etc.	⇉Cancel; see item A-NEW
109401	NOTE—⇉Cancel; see item B-NEW.	
109402	NOTE—⇉Cancel; see item C-NEW.	
109403	NOTE—⇉Cancel; see item G-NEW.	
109810	**Lighting Fixtures,** etc.	⇉Cancel; see item A-NEW
109811	NOTE—⇉Cancel; see item B-NEW.	
109812	NOTE—⇉Cancel; see item C-NEW.	
109813	NOTE—⇉Cancel; see item D-NEW.	
109814	NOTE—⇉Cancel; see item E-NEW.	
109815	NOTE—⇉Cancel; see item F-NEW.	
109816	NOTE—⇉Cancel; no further application.	
109817	NOTE—⇉Cancel; see item G-NEW.	

<u>Proposed Classification Provisions</u>: — Concluded

Item No.	Description	Class

CONCURRENTLY, ADD THE FOLLOWING NEW ITEMS:

LAMPS OR LIGHTING GROUP: subject to item 109000

⇉A-NEW **Lamps or Lighting Fixtures,** see Notes, items B-NEW, C-NEW, D-NEW and E-NEW, **viz.:**

Floor Standing Lamps, with or without integral tray, also in Package 817;

Fluorescent or High Intensity Discharge (HID) Lighting Fixtures, NOI, with equipment of transformer or ballast, also in Packages 220, 233, 790, 919, 1406, 2228, 2312 or 2477, see Note, item F-NEW;

Housings, recessed incandescent lighting fixture;

Lamps, NOI, also in Packages 794, 817, 1424, 1467, 2204 or 5F;

Lighting Fixtures, NOI;

Parts, lamp, lantern or lighting fixture, NOI;

In boxes or crates, subject to Items 170 and 171 and having a density in pounds per cubic foot of, see Note, item G-NEW:

Sub 1	Less than 1	400
Sub 2	1 but less than 2	300
Sub 3	2 but less than 4	250
Sub 4	4 but less than 6	150
Sub 5	6 but less than 8	125
Sub 6	8 but less than 10	100
Sub 7	10 but less than 12	92.5
Sub 8	12 but less than 15	85
Sub 9	15 but less than 22.5	70
Sub 10	22.5 but less than 30	65
Sub 11	30 or greater	60

⇉B-NEW NOTE—One lamp (bulb) for each socket may be included in same box with lamp or lighting fixture.

⇉C-NEW NOTE—The quantity of globes, shades, reflectors or similar devices must not exceed the number required to equip the articles with which shipped.

⇉D-NEW NOTE—Lighting fixtures are lighting devices designed for permanent wiring to walls, ceilings, floors, posts or other similar mountings.

⇉E-NEW NOTE—Does not apply on electric lighting fixtures equipped with posts or poles exceeding ten feet in length. Provisions for such lighting fixtures are found in items 161150 through 161240.

⇉F-NEW NOTE—Accompanying equipment of iron or steel or plastic reflectors may be in packages.

⇉G-NEW NOTE—When lamps or lighting fixtures and their complement of globes, shades or reflectors are in separate packages, the density for determining the applicable provisions must be the result of the division of the total weight of all packages by the total cubage (cubic displacement) of all such packages.

ATTACHMENT B

PROVISIONS OF ITEM 49265

Item No.	Description	Class
	CLOTH, DRY GOODS OR FABRICS, subject to item 48920	
49265	**Cloth, Fabric or Piece Goods,** natural or synthetic fibre, separate or combined, knit or woven, see Notes, items 49266 and 49267, **viz.:**	
	Cloth, Fabric or Piece Goods, NOI;	
	Corduroy;	
	Plush or Pile Fabric, NOI;	
	Terry Cloth;	
	Turkish Toweling;	
	Velour;	
	Velvet or Velveteen;	
	In boxes, wrapped bales or rolls, or Packages 709 or 2282, subject to Items 170 and 171 and having a density in pounds per cubic foot of:	
Sub 1	Less than 1	400
Sub 2	1 but less than 2	300
Sub 3	2 but less than 4	250
Sub 4	4 but less than 6	150
Sub 5	6 but less than 8	125
Sub 6	8 but less than 10	100
Sub 7	10 but less than 12	92.5
Sub 8	12 but less than 15	85
Sub 9	15 but less than 22.5	70
Sub 10	22.5 but less than 30	65
Sub 11	30 or greater	60
49266	NOTE—Applies only on cloth, fabric or piece goods in the original piece or mill end remnants. Does not apply on partially or wholly manufactured articles.	
49267	NOTE—Provisions also apply on fire- or water-resistant cloth, fabric or piece goods.	

ATTACHMENT C

2200 Mill Road
Alexandria, VA 22314-4687
www.nmfta.org

703-838-1810
fax 703-683-1094
nmfta@nmfta.org

NMFTA

NATIONAL CLASSIFICATION COMMITTEE

NATIONAL MOTOR FREIGHT CLASSIFICATION
Proposal Notification—Docket 2005-3

June 9, 2005

On Monday, August 8, 2005, a National Classification Committee (NCC) Panel will conduct a public meeting to consider proposals, review matters and other issues relating to the provisions of the *National Motor Freight Classification (NMFC).* The meeting will be held at the **Sir Francis Drake Hotel, 450 Powell Street, San Francisco, California 94102,** commencing at **7:30 a.m.** The telephone number of the hotel is 800-795-7129.

Our records indicate that you participated in an NCC research survey relating to one of the proposals OR you represent shippers who might have an interest in one of the proposals. Accordingly, we have enclosed a copy of NCC Docket 2005-3. The proposals the Classification Panel will consider are shown in Section I of the docket with the corresponding staff analyses.

The NCC invites you to submit information relating to the transportation characteristics—density, stowability, handling and liability—of the product(s) involved, or relevant to packaging materials or methods in connection with proposed packaging amendments. The information you furnish should include any underlying studies, supporting data and other facts that you deem pertinent.

As explained on pages 2 and 3 of the docket, **all facts, data and evidence must be received by the NCC no later than July 11, 2005, for inclusion in the public docket file,** although you may submit statements or analyses based on the information in the public docket file until July 25, 2005. After July 25 the public docket file will be closed. **Decisions on docketed proposals will be based on the information in the public docket file.** The NCC is committed to protecting the confidentiality of commercially sensitive information. The identity of specific products (model numbers, trade names, etc.) and the name of the company or individual providing the information will not be made part of the public file.

All material in the public file—including how to contact the proponent—is available to you without charge at **www.nmfta.org.** The public files are organized by docket and subject numbers, and each file is indexed for ease of reference. If you do not have Internet access, you can obtain the public docket file from the staff contact, as identified in the docket, subject to a charge for copying and transmitting the document(s) requested.

Anyone who submits a written statement on a proposal prior to the meeting, or anyone who attends the meeting in connection with a proposal, will be registered as a Party of Record to that proposal. The proponent of a docketed proposal is also registered as a Party of Record to that proposal. Parties of Record will be mailed the disposition of the proposal and will be entitled to seek arbitration or reconsideration of the Panel's decision.

If you wish to schedule an appearance at the public meeting or require further information, please contact Matthew Welsh at 703-838-1869 or welsh@nmfta.org. Written statements should be addressed to: National Classification Committee, 2200 Mill Road, Alexandria, Virginia 22314, or may be e-mailed to the staff contact or faxed to: 703-683-1094.

Very truly yours,

NATIONAL CLASSIFICATION COMMITTEE

Joel L. Ringer
Manager, Classification Development

Enclosures

ATTACHMENT D

Weber-Stephen Products Co.

November 23, 2005

The Honorable Roger Nober – Chairman
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

Subject: National Classification Committee

Dear Roger,

Please be advised that our company participated in the review of the freight classification for charcoal grills in 2005 (Docket 2005-2, Subject 16). We worked closely with the committee and we were very pleased with the outcome. We found the process to be fair and the committee members to be extremely professional. The committee was very helpful in explaining the process from the outset and again toward the end of the process, with updates regarding the docket. In addition, all inquiries were answered in a timely fashion. More importantly, I never sensed any bias throughout the process.

In closing and regardless of the outcome, our company feels that the process worked well and that it should be allowed to continue. Thank you for considering our company's opinion.

Best regards,

Michael J. Sweeney
Vice President of Logistics

www.weber.com 200 E. Daniels Road *t* 847.934.5700
Palatine, Illinois *f* 847.934.3153
60067 USA
email:

DESA

The Honorable Roger Nober
Chairman
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

November 21, 2005

My name is Bob Oda. I am the corporate traffic manager for DESA LLC - an industry leader in gas heating products and tools. Among the items currently sold by DESA are chains saws, tillers, lighting fixtures, door chimes, fireplaces, and portable heaters. The annual sales for DESA are around $500 million and the freight spend is roughly $15 to $20 Million. I have been with this company for over 4 years and, prior to this, I worked as a transportation manager for the Electrolux range plant in Springfield, Tennessee for two years. I am sending this note in recognition of the positive experiences that I recently had in dealing with the NCC.

In just the past 2 years, I have drawn on the services of the Committee for the first time in my short career to address different classification issues. As a medium sized shipper, at times, it has seemed that the trucking companies have had an unfair advantage. Considerable knowledge and resources help to drive the successful LTL companies. They own a "lion's share" of the available capacity and with this has come considerable leverage in negotiations over classification disputes. I believe that National Classification Committee, for me, has helped to "even the playing field."

My first experience with the NCC was a culmination of on-going disagreements with carriers over the classification of one of our company's major product lines, portable gas heaters. During the latter part of 2002, I discovered that an LTL carrier, prominent within the industry, had continually been reclassifying these products to their advantage. At the time, I did not accept the carrier's position but it was difficult to defend our argument against a billion dollar company who claimed to hold all of the facts. I had an NMFC but little understanding of its design and purpose. To the novice, the governing rules of the National Motor Freight Classification (NMFC) are vast and exhibit a complexity that can be overwhelming without qualified support. I called a number to the NFTA listed on the first couple of pages hoping to get some direction on how to formally address this issue. I received the support that I was looking for.

The NMFTA rep agreed to review the current classification of our products. I sent him brochures along with specifications and photos that I had taken myself. The staff agent examined the information that I sent and responded back that the item number being applied to our heaters was vague, certainly leaving room for interpretation issues amongst my carriers. He provided another that seemed more appropriate and most companies accepted the suggested item number, particularly with the NMFTA's endorsement. There did not appear to be an issue with carriers regarding this issue for well over a year.

While attending the course on classification offered by the NMFTA in the spring of 2004, I learned that the issue of portable gas heaters was to be reviewed by the Committee during that summer's meeting. Until that point, I did not realize that some carriers had been appealing to the NCC to add clarity to the current definition for portable gas heaters and to increase the assigned class. Knowing this, I began to take a serious interest in the purpose and workings of the NCC. A valuable resource for achieving knowledge in this area has been the NMFTA's website. I spent a good bit of time reading over the public docket files and recent classification actions. From this experience, I gained a clear understanding of the criteria used to determine classifications along with the process and procedures taken by carriers and shippers to make changes.

Included in one dockets was a description of the Review Matter dealing with gas heaters to be discussed in the next meeting (August 04'). I learned from my readings that a study had been performed on gas heaters but it was based upon limited participation from shippers as stated by the staff agent. I personally was concerned with the portion of the exercise dealing with the density of the freight examined, as I believed it to be significantly lower than what is represented by DESA's product. I took comfort; however, in realizing that this was only to be a Review Matter and; consequently, a final decision would not yet be made. I appreciated the fact that notification regarding the meeting was given several weeks in advance thus allowing plenty of time for me conduct my own study and to report my findings. I did not attend the August 04' meeting but did provide a formalized statement along with a copy of my study disputing the research findings previously submitted.

Within 30 days of the Review Meeting, I received notification, by mail, that a decision had been made by the NCC to consider this issue of portable gas heaters as a Subject Matter at the fall meeting in November 04'. I knew this to mean that a ruling was to be made on whether or not to change the current description and/or classification used for our products. At first, I was apprehensive regarding the situation I was faced with. Despite what I read about other dispositions, I still perceived it to be a persecution – me, alone, facing a firing squad of carrier opposition. I envisioned a shouting match with the outcome undoubtedly falling in the carriers' favor.

Speaking to the staff agent; however, I quickly over came these feelings. To begin with, he reminded me that several weeks are allowed before the meeting to perform additional research to support a position. Secondly, I learned that the NCC would consider postponing a final decision to a later meeting if convinced that more time was needed for gathering information and reporting. Most importantly, I discovered that clearly stated on every docket is an announcement that one can file for arbitration after a decision is made if he or she disagrees with the disposition. I did not believe this would be a necessary course of action for me, however. The required focus points and direction of my statement had already been made clear by the past actions of the NCC. In brief I knew that my arguments simply had to speak to each of the shipping characteristics of density, stowability, handling, and liability. I realized that, if I provided the necessary facts to back up my statement over and above the counter argument, the final decision should go in your favor.

I was impressed with my experience at the Review Meeting in November 04'. Seasoned by recent verbal confrontations with carrier reps over class issues, it was a pleasant surprise to be immersed in a calm/controlled atmosphere. The committee, lead by the chairman, listened attentively to each presenter and appeared to be objective in every decision that was rendered.

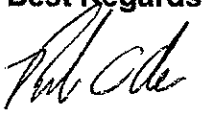
I presented DESA's case regarding the Subject Matter of Portable Gas Heaters and the board settled on a ruling that appeared satisfactory to both carriers and shippers alike. Based upon the study and outside information received to that point, the NCC had been considering raising the classification of all portable heaters from 85 to 150. I presented the results of my study that demonstrated that a significant percentage of DESA's portable gas heaters had a density that would qualify for class 100 or under. I asked the NCC to change the definition of the item to include a density scale thus allowing our product of greater density to ship at a lower class. The NCC asked several questions and I even debated directly with one member over a particular issue. They all were respectful of my position, never seeming reproachful in their remarks when they disagreed. Eventually it was settled that a density scale would, in fact, be added to the item number. The issue over reclassification on portable heaters has gone away ever since this disposition was made.

I have recently become involved in another Review Matter process, this time for a different DESA product line, gas log sets. During late spring of 05', I received word that a proposal had been made by carriers for the NCC to authorize a change to the existing freight class for this commodity. The subject of gas log sets was to be a Discussion Matter during the quarterly meeting to be held in May 05'. As was the case with gas heaters, the preliminary research was based upon very limited participation by shippers. I aimed to change this. The staff agent was the same individual and I contacted him to express DESA's interest in attending the meeting. We were invited and I again had an opportunity to address the Committee.

The NCC and Chairman were very welcoming in their demeanor and approach. They expressed sincere appreciation for our interest and spent several minutes asking us about our company and the commodity in question. I voiced my concerns over any conclusions that may have been drawn to that point based upon the data that had previously been submitted. The staff agent for this Matter showed interest in conducting a research project. Further examination would provide more information upon which the NCC could decide at a later meeting if a change in definition or classification was necessary. I am looking forward to having the opportunity to defend DESA's position regarding this matter at one of the first two meetings next year. Based upon past experience, I am confidant that, under the governing body of the NCC, a decision will be reached that is acceptable to carriers and shippers alike.

Although few in number, my experiences with the NCC have been very positive. I believe that shippers should take a more active role in their quarterly meetings and should stay current on what is reviewed and discussed at these events. More importantly, companies should actively represent themselves in these meetings through correspondence and presentation. The meetings and dispositions are all public; we are not forced to accept decisions without having an opportunity to deny opposing positions with debate supported by pertinent facts. As long as shippers take the initiative, the means of exacting or refuting change are provided.

Best Regards



Bob Oda
DESA, LLC
Corporate Traffic Manager
270-745-7715
boda@desaint.com

PUBLICATIONS INTERNATIONAL, LTD.

December 14, 2005

The Honorable Roger Nober
Chairman
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

Mr. Nober:

I have had occasion to interact this year directly with the National Classification Committee, and my experience was very positive. My company, Publications International, LTD., ships a stationery product, classified under Stationery, NOI, at a flat class 100. We did a density study and found that 70% of our product was 22 to 30 pcf. We then prepared and submitted a proposal to the NCC to change the NMFC classification for stationery to Stationery Sets, with a full density group attached to that item, so that we could ship our product by density, thereby allowing for the heavier product to ship at lower rates, and the lighter product to ship also at the proper rates, rather than bulking everything under class 100. We felt that this would be a fair situation for us, and for our carriers.

Our proposal was received and acknowledged immediately by Mr. Dan Horning at the NCC. Mr. Horning processed our proposal in a very expedient manner, and communicated with us throughout the process. Our proposal was received in March 2005, and was scheduled for review in Docket 2005-3, on August 8, 2005. We were then notified in a letter dated August 12, 2005 that our proposal was approved as docketed.

As Shipping Manager for Publications International, LTD, I have worked very closely with our freight carriers to properly identify our product and ship under the proper classifications according to the National Motor Freight Classification. As a company, we have revised our management information systems to cross-reference each product category with the proper NMFC codes, and identify product on the BOL by class and density. We ship several items classified by full density groups, many of which are subject to NMFC Items 170 & 171, and frequently use the 'bump clause' whenever it properly applies to our shipments.

I am very happy with the current classification system, and in my experience, it appears to be fair for both shipper and carrier. My interactions with the NCC have been both positive and fair. I was impressed with the ease of both proposing and effecting change to the NMFC to make it more applicable to our product. I believe we have a good system in place for classifying and rating product in the shipping industry.

Sincerely,

Robert Griffis,
Shipping and Orderfill Manager
Publications International, LTD.

7373 North Cicero Ave., Lincolnwood, Illinois 60646 847/676-3470 TELEX 280084 PIL SKO FAX 847/676-3671

November 15, 2005

The Honorable Roger Nober
Chairman
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

Dear Mr. Nober:

I am writing on behalf of the International Safe Transit Association (ISTA), an association that is an alliance of manufacturers, carriers, packaging suppliers and testing laboratories with over 730 company members in support of the National Classification Committee and the results that it achieves.

Working very closely with NCC for over 10 years on Packaging Performance Test Standards, which are now part of the Classification in the form of Rules 180 and 181, has shown ISTA, first hand, the excellent quality, knowledge and abilities of the NCC staff members. Beginning this month a joint project has started to review and update 180 and 181 and both our volunteer members and ISTA staff look forward to working together on this cooperative undertaking.

The excellent efforts of the NCC to provide a fair process that brings an evenhanded approach between shippers and carriers in the form of the current classification system must be allowed to continue. Also, to insure that this system works, the NCC must continue to be provided with their antitrust immunity.

Thank you for your time and consideration of ISTA's position regarding the National Classification Committee.

Sincerely,

Edward A. Church
Executive Director

1400 Abbott Road, Suite 160 East Lansing, Michigan USA 48823-1900
517.333.3437 phone 517.333.3813 fax www.ista.org

RUBENSTEIN – LOGISTICS SERVICES, INC.

RUBENSTEIN LOGISTICS SERVICES

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Divisions:

* *S-R-F-T-C BROKERS*
* *RLS CARGO*

Bruce D. Hocum, President
bruce@srftc.com

November 28, 2005

The Honorable Roger Nober
Chairman
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

Docket Number: STB EX Parte No. 656 (Sub-No. 1)

Case Title: Investigation into the practices of the National Classification committee

Dear Mr. Chairman:

My name is Bruce D. Hocum. I am President and owner of Rubenstein Logistics Services Inc. at 6960 Madison Ave W, Golden Valley, MN, which was founded in 1961 by Mr. Samuel Rubenstein. I joined the firm in 1968. The purpose of this letter is to inform the Surface Transportation Board of my support of the current classification system.

Rubenstein Logistic Services assists carriers and shippers alike in their day-to-day transportation needs. Some of the services we provide are as follows:

- Pre-audit of freight bills prior to payment to insure the charges are correct in accordance with the tariffs or contracts between our clients and carriers
- File loss and damage claims
- File for operating authority for our numerous carrier clients
- Negotiate freight rates with all modes of transportation
- Arrange transportation for all modes of transportation through SRFTC Brokers Inc., our sister company
- Publish individual carrier tariffs for our carrier clients
- Quote freight rates for both carriers and shippers
- Classification of products shipped in the LTL transportation environment

I personally have appeared before the classification committee and the member carriers since the early 1970s. The National Classification Committee (NCC) staff has always been very helpful and easy to work with. These people have bent over backwards to help my customers and my company whenever necessary. At no time in my career have I ever felt that I was misinformed on any issue.

It has also been my experience that the motor carriers who are member carriers of the NCC have been extremely helpful and have listened whenever I make a presentation regarding a reclassification of a product or classification of a new product in the market place. I believe the present system is fair and equitable to all carriers and shippers.

Since the ICC Termination Act of January 1, 1996, there have been several major shipper organizations that I am aware of that have been attacking the present classification system. I have attended some of these meetings and listened to some of the arguments. All of these arguments are totally unfounded in my opinion. When I confronted some of the individuals that were attacking the present system, I'd say "tell me what you think would replace the present system." Not one has ever been able to tell me what this new system would look or smell like; all they would say is we need a new system, which is just talk. I am very open to looking at any new system, yet I don't believe one has been presented that is workable.

Some of these organizations have suggested that we should allow shipper participants to act in the same capacity as the LTL carriers and be a joint committee. Again, in my opinion, this is totally an unworkable situation. I base this on a recent new classification of a client's product which is water softeners. We were able to submit significant data to the NCC and carriers, where competing water softener shippers would not see what the value per pound would be or other critical data such as pricing. If you were to have a shipper on the panel, then you run the risk of exposing our client's data which would be unacceptable from a competitive stand point.

In my opinion, the present system is not broken and is working very well; I whole heartily support the system as I have known it the past 40 years.

Yours very truly,

Bruce D Hocum

Bruce D. Hocum
President
Rubenstein Logistics Services Inc

STB Ex Parte No. 656 (Sub.-No. 1)

INVESTIGATION INTO THE PRACTICES OF THE NATIONAL CLASSIFICATION COMMITTEE

Statement of Raynard F. Bohman Jr. in Support of Continued Anti-Trust Immunity for the National Classification Committee

---

My name is Raynard F. Bohman Jr. I am a graduate of the Wharton School of Finance and Commerce at the University of Pennsylvania, where I majored in transportation.

Following service as an officer in the U.S. Army, where I served in the Transportation Corp., I have been in private practice as a transportation consultant representing national trade associations and individual companies. I also serve as the managing director of the International Furniture Transportation and Logistics Council, a world-wide organization of furniture transportation professionals.

I have been handling cases before the National Classification Committee and NCC Classification Panels for many, many years and am well acquainted with the changes in procedures that have come about over a long period of time.

Over the past several years, as a result of decisions by the former Interstate Commerce Commission and the current Surface Transportation Board, shippers have been given more advance notice of proposed changes in classifiction descriptions, ratings, shipping rules and packaging requirements. Whereas in the past NCC dockets were generally issued about 30 days prior to NCC Panel open meetings. By the time shippers received their dockets by mail, less than 30 days remained before the meeting. Other than subscribing to NCC dockets annually, there was no other way to learn about what was in the offing.

Today, NCC dockets are issued 60 days in advance, both on paper and on the Internet. Also, about a week later, a summary of the docket appears in TRANSPORT TOPICS magazine. Further, all known companies making a product affected by a proposal or review matter appearing on the docket are notified by mail by the NCC staff of its pendency. The NCC appears to be going out of its way to get the word out to those shippers who may have an interest in any docketed proposal.

The docket itself is now far more detailed than it ever was. In the past, the dockets contained present provisions and proposed revisions, but a minimum amount of factual information that as to the justification for a revision or new provision. Members of a Panel or the full NCC were given far more information ahead of time, but what was between the covers of those loose-leaf binders was confidential and was not to be shown to any affected shipper.

Today, just about everything affecting a proposal is released to the shipping public well in advance. Included is detailed information about the four transportation characteristics of a product or products as developed by the NCC staff. The dockets now include charts and sometimes pictures of the product or products, some as packaged for shipment. It gives all affected shippers an opportunity to see in advance how the transportation characteristics of their products compare with the characteristics of the products that the NCC staff developed. And you can get this information on the National Motor Freight Traffic Association web site, without charge, or on request it from the NCC staff, also without charge. Overall, shippers have far more information in hand before an NCC Panel meeting than they ever had in the past.

At the NCC quarterly Classification Panel meetings, they are conducted far more informally than they were in years past as a result of the arrangement of tables for seating of both Panel members and shippers who appear to speak on a particular subject. This setup has made shippers feel far less intimidated by the whole process than they were in the past.

Once a Panel completes deliberations on a particular subject, a vote is taken, the results of which are announced (and posted on a board) within a matter of minutes. And if any party wants to know how any individual Panel member voted on a particular subject, their names and how they voted are promptly communicated to them following a request by any interested party.

And if a shipper is a party of record and is not happy with a vote taken by a Panel on a particular subject, that shipper has the option of (1) requesting that the decision be subject to arbitration, or (2) be appealed to the full NCC at its next meeting. Just as an aside, I requested the last time the STB considered whether or not to continue the NCC's anti-trust immunity, that as an alternative to arbitration for appeals, that shippers be given the option of filing an appeal to the full NCC - a suggestion the STB adopted. (It is interesting to note here that since the STB gave shippers the option of arbitration as a means of appeal, not a single shipper has ever exercised the arbitration option. All appeals have been directed to the full NCC.)

All I can say is that since the last time STB reviewed whether the NCC's anti-trust immunity should be continued, the whole process has provided interested shippers with more factual information than they ever had before and has done so in a more timely manner. I have seen nothing to indicate that the full NCC or its Classification Panels have become less transparent in their dealings with the shipping public.

And where are most of the complaints coming from? In my view, they primarily come from shippers whose transportation characteristics have changed to the point where they no longer warrant the level of ratings they enjoy or have enjoyed for a number of years - ratings that don't meet the NCC's "Density Guidelines".

From what I have observed over the years is that the members of the NCC take their role very seriously and lean over backwards to try to resolve each proposal that comes before them in a fair and equitable manner, given the narrow parameters in which they are obligated to operate under. And they do so at the risk of having some shippers taking it out on their companies, as their votes can be made available on request.

I, for one, believe the NCC's anti-trust immunity should be continued. It's fair to both sides. Product transportation characteristics are changing in many industries and the NCC is just trying to keep up with them; to keep the NATIONAL MOTOR FREIGHT CLASSIFICATION current and viable.

This concludes my statement.

Respectfully submitted,

Raynard F. Bohman Jr.

Raynard F. Bohman Jr.
President
Bohman Industrial Traffic Consultants, Inc.

Dated: December 7, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this date - December 7, 2005, I have served a true copy of this statement on the National Classification Committee, 2200 Mill Road, Alexandria, VA 22314, by first class mail with proper postage affixed.

Raynard F. Bohman Jr.

Raynard F. Bohman Jr.

SECTION IV

ARGUMENT OF COUNSEL

IV.

ARGUMENT

A. The Comments of the Lamps and Lighting Fixtures Manufacturers and Trade Associations are Not Credible

Responding to allegations by certain shipper interests that the classification process was perceived as biased in *Section 5a Application No. 61 (Sub-No. 6) National Classification Committee Agreement, Decision served November 20, 2001*, the Board required that initial classification decisions, upon shipper request, had to be submitted to a neutral arbitrator before the classification determination could become final. The Board concluded that:

> We believe the best way to provide the necessary assurance of fairness in the collectively established classification process is to require the NCC to provide interested parties with an option of review by a neutral arbitrator. (2001 Decision, p. 19)

With great effort and after incurring substantial expense the NCC was able to enlist an organization, Transportation Arbitration and Mediation, PLLC, under the direction of Fritz R. Kahn, a former ICC General Counsel and respected member of the transportation bar, to administer the classification arbitration process. As demonstrated on NMFTA's website, the arbitrators enlisted by Mr. Kahn include former ICC Commissioners and staff and transportation attorneys well versed in transportation matters. The procedures implementing the Board's requirements for the arbitration process are set forth in Article V of the NCC's Agreement. Those procedures were recognized by the Board as the NCC's "good faith effort" to comply with the agency's requirements and were approved by the Board in Section 5a Application No. 61 (Sub-No. 6), *National Classification Committee – Agreement*, Decision served October 16, 2003 at pages 3-5.

In the decision instituting this proceeding the Board indicated that:

> [T]he Board imposed conditions as part of its last renewal of antitrust immunity for the NCC bureau agreement. We are particularly interested in receiving detailed comments on how those conditions are working, and, if persons did not avail themselves of any of those protections, why they did not do so.

The responses of various lamp and lighting fixtures comments regarding their failure to avail themselves of the arbitration process are not only unconvincing, but evidence their lack of any serious intent to do so.

Of the six comments submitted by lamps and lighting fixtures interests, two, The Genlyte Group Incorporated (Genlyte) and Acuity Brands Lighting (Acuity), make no response as to why they did not avail themselves of any of the review procedures that were available. Those that do respond to their failure to seek arbitration demonstrate that no effort was made to utilize the Board-approved arbitration process. Representative of those responses are the comments of the National Electrical Manufacturers Association (NEMA), alleged to be the leading U.S. trade association representing the interests of the electroindustry manufacturers. It states that:

> While arbitration was an option proposed to us by NCC representatives, it was entirely possible that the panel would have been comprised of only carrier representatives, and utilizes only the NCC data and record. Arbitration would have been a useless and expensive exercise. (NEMA Comments, p. 2)

That explanation is wrong on all counts. The neutral arbitrator, as NMFTA's website plainly establishes, is not a carrier representative or panel of carrier representatives. Also, the procedures provide that the entire public record is to be transmitted to the selected arbitrator and, concurrently, to the person requesting arbitration. (Rule 4, Art. V). Hence, any and all information and data submitted or developed in conjunction with any classification matter comprises the record before the arbitrator. If any data is not provided that certainly would be apparent to the parties. There is no basis for NEMA contending that resort to arbitration would

have been a useless exercise or that the untried arbitration procedure, simplified to accommodate classification matters, would have been expensive.

The complaint of the American Lighting Association (ALA) also is misguided. ALA claiming that the arbitration process was not utilized because the NCC has "distinct advantages" in the process asserts that:

> Shippers, when opposing a revision of class ratings, must submit their evidence in advance of the NCC meeting. This allows the NCC the opportunity to develop its testimony to oppose the shipper's case. The shippers, if they request arbitration, are at a serious disadvantage because current rules require the arbitrator to make judgment based only on existing data/arguments. Shippers are precluded from offering any evidence refuting NCC arguments made at the NCC meeting. (ALA Comments, p. 2).

Those allegations misconstrue the purpose of the NCC's Board-approved rules of procedure, and are incorrect.

As was recognized by the Board in originally approving the NCC's procedures, Article III, Section 3(c)(2), which provides that interested parties may submit statements including underlying studies, work papers, supporting raw data and any other information relating to a docketed proposal no later than thirty days prior to the public meeting, is reasonable and necessary. The Board rejected the arguments of certain Shipper Groups that more time was necessary to develop comments challenging a docketed classification proposal, noting that such extensions would necessarily come at the expense of the NCC's ability to analyze that information. (March 21, 2003 Decision, p. 14).

That timeframe also was designed to preclude the practice of some shippers of not presenting their information/data until the NCC meeting, thereby unduly delaying the handling of the proposal. Nevertheless, the NCC, on its own initiative and with Board approval, provided in Article III, Section 3(c)(3), that no later than fifteen days prior to the public meeting, the NCC

and any other interested party may submit a statement regarding the information of record, i.e. rebuttal, but that no new facts, data or evidence could be submitted thereby precluding the initial withholding of such information. (*See* March 21, 2003 Decision, p. 14). Moreover, the NCC and its Classification Panels are very flexible in accommodating situations where new information not previously available comes to light or shippers request an opportunity to work with NCC staff to develop information/data which could not be compiled before the meeting.

Shippers are presented every opportunity at the NCC public meeting to make their views known and to question and/or respond to any matters presented for consideration by the NCC regarding a proposal. It certainly is not a disadvantage to a shipper for an arbitrator to make a decision based on the NCC's public record because as designed by the NCC, and approved by the Board, all information and data material to the merits of a classification proposal should be included therein.

The assertion that the shippers cannot refute "NCC arguments" made at the NCC meeting at the arbitration is incorrect. Under Article V, Rule 5, a party to the arbitration is permitted to submit a statement of position as to why the initial classification action is not in conformity with established classification standards – clearly an opportunity to address any comments at the NCC meeting which is part of the public record. Additionally, at the arbitrator's discretion, the person requesting arbitration can submit a rebuttal to the NCC's reply to a statement of position. ALA's contentions are simply wrong on all counts and do not provide a rational explanation for not seeking arbitration.

The confusion or misunderstandings of NEMA and ALA as to the arbitration procedures obviously influenced Pacific Coast Lighting (Pacific Coast) and Holtkotter Leuchten (Holtkotter) in their responses. Pacific Coast reiterated ALA's erroneous assertion that there would be no

opportunity to respond to NCC statements made at the meeting. (Pacific Coast Comments, p. 2). Holtkotter incorrectly contends that the shippers have no way to rebut the NCC's statements, and that the arbitrator is powerless to do anything but confirm the NCC's classification action. (Holtkotter Comments, p. 2).

Viewed in light of the NCC's actual rules of procedure it can be seen that the lamp and lighting industry comments are erroneous *post hoc* rationalizations designed to justify their refusal to submit their evidence to a neutral arbitrator. Rather, they have taken an unjustified course of retaliation against the NCC ignoring the actual facts and circumstances surrounding the reclassification of their products.

Several of the parties repeat the contention raised in the lead proceeding that shippers should serve on the NCC and have an equal vote with the carriers on classification matters. It is further proposed that a "neutral chairperson" be appointed by the Board who would break tie votes. (*See*, e.g., ALA Comments, p. 2). What is ironic about that proposal is that shipper participation would certainly involve greater expense and burdens for the shippers than the arbitration process they have rejected for those very reasons. Moreover, in substance, what they propose is another form of the very arbitration approved by the Board; namely, a neutral party making a decision when the shippers and carriers disagree on a classification matter. The shippers' circular reasoning on this point plainly evidences that there simply is no valid reason why they have refused to invoke the arbitration process.

The NCC submits that the legal and practical reasons why shippers should not be included in its Section 5a Agreement and permitted to decide classification matters are set forth in its April 1, 2005 Reply Comments and its April 21, 2005 Rebuttal Comments in the lead proceeding and will not be repeated here. But, given the views expressed by those shippers

which have submitted comments in opposition to the NCC here, can it realistically be concluded that those persons would reasonably and fairly assess the merits of classification proposals for increases or reductions on their products? Moreover, with respect to shippers voting on classification proposals affecting their competitors can the agency exempt them from the application of the antitrust laws if their actions competitively harm other companies? The Board clearly responded to the issue of shipper voting in its Decision served on November 20, 2001, in *National Classification Committee – Agreement* finding that:

> …[I]n our view, it is not necessary or appropriate to require shipper voting because providing a right of review by a neutral entity should foster shipper confidence in the fairness of the process. Similarly, we do not believe that it is necessary or appropriate to require the NCC to "outsource" initial classification decisions to a separate entity. (At p. 19)

As this record demonstrates, the opposing shippers have failed, without good cause, to avail themselves of the arbitration process created because of their allegation of unfairness. That failure should not pass without criticism by the Board, particularly given the administrative effort and expense incurred by the NCC in implementing a neutral arbitration system which imposed little burden on the parties.

One final observation must be made regarding the lamp and lighting fixture comments as to the density data that was provided by them to the NCC. Although that information is variously characterized as "solid evidence for no change" (*See*, e.g., NEMA Comments, p. 2), conspicuously absent is any specific data referring to the density characteristics exhibited by lamps and lighting fixtures. The accompanying Statement of Joel L. Ringer, NMFTA's Manager of Classification Development, addresses that evidence in considerable detail, and demonstrates that those density characteristics were consistent with the information developed by the NCC which included some 65,000 shipments of the involved commodities actually transported by

motor carriers. Furthermore, Mr. Ringer shows that the reclassification approved by the NCC is consistent with the classes established and approved by the Board on other commodity groups exhibiting similar density ranges. In light of that demonstration, and the lamp and lighting fixture companies' failure to substantiate that the density characteristics of their products did not warrant the full scale density provision applied by the NCC, no weight can be given to their self-serving allegations as a demonstration of an "abuse of market power," or as grounds not to approve the NCC's Section 5a Agreement.

B. The National Confectioners Association's Failure to Respond to NCC Notices Regarding the Reclassification of Candy Gave Rise to Reliance on the Available Density Data

The National Confectioners Association's (NCA) principal complaint is that the recent reclassification of candy occurred without notice to the candy industry of the impending classification change. (NCA Comments, pp. 3-5). The NCC, which sent five notices of the NCC's review and handling of the classification matter, properly addressed to Larry Graham, NCA's President and the author of the NCA's Comments, disagrees that proper notice was not given. A review of the Board's requirements regarding notification will clarify this issue.

In Section 5a Agreement No. 61 (Sub-No. 6), *National Classification Committee – Agreement*, Decision served November 20, 2001, the Board rejected a National Industrial Transportation League proposal that the NCC be required to develop a database which, among others, would include "any other shippers that the NCC believes would be affected by a particular classification proposal." The Board concluded that:

> We do not believe that it is either necessary or practical to require the NCC to compile a database or attempt to provide direct notice to individual entities. Rather, we think that its is sufficient for the NMFTA to publish all classification proposals on its website and in its Docket Bulletin. (2001 Decision, at p. 12).

In addition, the Board concluded that the NCC should provide notice, as well, to participating shippers and to the identified associations that participate in a particular NCC research project. (2001 Decision, at p. 12). Those notice requirements have been incorporated into Article III, Section 3(c)(1)(i)(ii) and (iii), and have been approved by the Board.

Patently, notice of the candy classification matter was provided in strict compliance with those requirements. NCA, the trade association representing over 90 percent of the candy industry, and a participant in classification matters in the past,[1] was notified no less than five times during the course of the handling of the candy matter, and was, at that time, provided with pertinent reports, but failed to respond. It is not sufficient to now allege, self-servingly, that "NCA has no record or recollection of ever receiving such notice." (NCA Comments, p. 1). Proper notification was provided to NCA's Mr. Graham who, for whatever reason, did not respond. That is not the fault of NCC or its staff, and certainly does not constitute an alleged "abuse of market power." Full compliance with the notice provisions in Section 3, Article III was implemented by the NCC.

NCA complains that it may have to "undo" the present reclassification which it alleges is improper. However, further proceedings before the NCC would not have been necessary if NCA had participated in the original reclassification as it was requested to do. Also, the outcome of the upcoming review is far from settled, and whether there will be any need to "rectify" the current classification item remains to be determined given the fact that the recent proceeding demonstrated that, because of packaging and product design very light candy shipments are being tendered to the carriers. Nevertheless, NCC staff will cooperate with NCA and any

[1] See *Motor Class, Rating on Candy or Confectionery*, 353 I.C.C. 314 (1977), in which the National Confectioners Association was the principal party opposing the reclassification of hollow mold chocolate.

individual candy manufacturers to assure that a complete record giving full weight to their data will be compiled to assess the transportation characteristics of their products.

C. The Freight Transportation Consultants Association, Inc. Confuses Classification and Ratemaking Matters.

As the Freight Transportation Consultants Association, Inc. (FTCA) indicates, its interest in this proceeding is limited to a single issue; namely, the NCC's use of "Value Guidelines" when classifying commodities. The basis for its suggested elimination of those guidelines is predicated on the presence of maximum limitations of liability in the tariffs of identified motor carriers. (FTCA Comments, pp. 1-2).

The Statement of Joel L. Ringer deals with the lack of representativeness of the study which underpins the FTCA proposal, and establishes that there is little uniformity in the limitations of liability established in the carriers' rate tariffs. In any event, the proposal to eliminate the "Value Guidelines" must fail for several other reasons.

First, and foremost, the classification and the carriers' tariffs do not serve the same function as is assumed by FTCA. As was concluded by the ICC in *Charge For Shipments Moving On Order – Notify Bills*, 367 I.C.C. 330 (1983):

> The classification tariff and the class [rate] tariff, although complementary, serve entirely different purposes. While the classification is designed to reflect the characteristics of the commodity transported, the class tariff reflects the characteristics of the haul. Specifically, the class tariff establishes the rate relationship between localities based upon weight and distance. Use of the classification in conjunction with the class tariff has made it possible for carriers to publish charges for transporting any article in commerce between any two points in the United States without the necessity of publishing millions of separate and distinct rates. [Footnote omitted.] (367 I.C.C. at pp. 335-336.)

Thus, the role of the motor carrier as classifier is entirely separate and distinct from its function as the ratemaker. The fact that in its rate tariff a carrier establishes a limitation of its liability

linked to a specific rate does not alter or delete the significance of the value of a commodity for classification purposes.

In classification, value is a measure of the potential liability of the carrier for loss or damage to the commodity and the susceptibility of the article to theft, and is a factor in assessing a commodity's liability to be damaged. See Ex Parte No. 98 (Sub-No.1), *Investigation Into Motor Carrier Classification*, 364 I.C.C. 906 (1981), 367 I.C.C. 243 (1983), and 367 I.C.C. 715 (1983). Irrespective of the actions of the ratemaker, value per pound, for classification purposes, remains an accurate indicator of the potential risk of loss the particular commodity presents to the carrier when transported. Moreover, as FTCA is well aware, a model shipper contract used in the marketplace, as well as the contracts of many shippers and of transportation intermediaries, imposes liability for the full actual loss or damage to the article, i.e. Carmack liability, on their carriers. Thus, even for those carriers having reduced liability limitations, the application of such provisions can be and often is eliminated by contracts.

Moreover, the value of an article can have a significant impact on a carrier's handling of a shipment which will be more susceptible to theft or to damage when the articles are of high value. Knowledge of the value characteristics of an article is critical to the carrier in assessing the security measures and special handling necessary which should or must be taken to safeguard the shipment from theft or damage.

As the ICC recognized, value per pound is a critical component of the standards of classification, and no sound reason exists for changing that relationship based on certain rate actions taken by some carriers which may or may not be applicable on a given shipment.

D. NASSTRAC's Comments are Based on Unsubstantiated Allegations and Misstatements

The National Small Shipments Traffic Conference, Inc. (NASSTRAC) reargues many of the same contentions raised and answered in the lead proceeding, and makes allegations based on *ipse dixit*, not fact. A prime example of NASSTRAC's unfounded statements is its contention that "the status quo is infected with anticompetitive bias in a number of major ways…" (NASSTRAC Comments, p. 1). Analysis of the purported reasons underpinning that contention shows that they do not accurately state NCC procedures or actions.

NASSTRAC alleges "bias" in the initiation of classification matters because carriers have no incentive to request the initiation of a proceeding that would lead to a reduced commodity class rating, and member motor carriers "pay nothing for NCC actions they request." (NASSTRAC Comments, p. 2). Carriers naturally are aware of changes in the transportation characteristics of the commodities they handle because such changes impact the transportability of those articles in the carriers' equipment. Therefore, it should not be surprising that when the transportation character of the freight a carrier handles changes that it will report that information to the NCC staff to study. But, that hardly equates to "bias." Shippers have full opportunity to have improvements in the transportation characteristics of their products acknowledged by the submission of a proposal, without any charge to them, to the NCC.

True, pursuant to Article III, Section 1(c) of the NCC's procedures, a shipper can request and receive assistance in conducting research on classification matters on a direct cost basis, and have the results reported to the NCC when it appears a classification change is warranted. But, it should be noted that it was the Board which approved the NCC's Agreement to be amended so that shippers, with direct cost reimbursement, can be assisted in conducting research upon

request. The Board rejected a shipper group proposal that such service should be rendered free of charge concluding that:

> We do not believe that it would be fair to require the NCC to use its own funds to conduct separate research investigations for shippers. However, with the changes that we are requiring, including the opportunity for resort to a neutral appellate reviewer, shippers may well conclude that it would be cost effective for them to conduct their own studies or to provide more input into the staff's research. (November 20, 2001 Decision, at p. 11).

So too, under Article III, Section 1(d), the staff, upon request, and without charge, is available to assist shippers in making appropriate proposals for classification changes. Moreover, wholly apart from a shipper retaining staff on a direct cost basis to conduct research, it is a fact that staff researches every proposal submitted, whether originated by a carrier or a shipper, to develop the transportation characteristics of the articles under review so that the NCC may properly assess the merits of the requested change.

NASSTRAC engages in sophistry when it states that the carriers "pay nothing" for requested classification actions, and then in a footnote acknowledges that the carrier members pay dues, but that NCC activities are supported by the sale of the National Motor Freight Classification book. The cost of implementing the NMFC exceeds carrier dues, and while future sales of the book will help to offset carrier costs, there will not be a complete recovery of expenses. Also, it should be noted that 2005 is the first issue of the NMFC where the proceeds will go to NMFTA, which recently obtained the copyright to that publication from the American Trucking Associations, Inc.

NASSTRAC makes contradictory and unfounded allegations regarding shipper knowledge and participation in classification matters. It should be recognized that NASSTRAC represents a small segment of the shipper population. Nevertheless it gratuitously states that

"most shippers are unaware of NCC activities" and "most shippers prefer not to initiate [classification] proceedings." (NASSTRAC Comments, p. 2). NASSTRAC counsel has no basis to make that representation to the Board. Equally misleading is the contention that in seeking changes in commodity class ratings shippers must provide extensive justification. (NASSTRAC Comments, p. 2). In the April 1, 2005 Statement of Joel L. Ringer in the NCC's Reply Comments in the lead proceeding, Attachment B is a copy of the commodity questionnaire sent to shippers in requesting information on their freight. The information sought is not extensive and does not request matters requiring extensive study by the shippers. As the Board concluded in Section 5a Application No. 61 (Sub-No.6):

> Simply requiring the proponent of a classification change to produce the data and work papers underlying reports and analyses that will be used to explain and support the proposal is reasonable. Accordingly, we find that the public interest requires that those who produce studies and analyses and who intend to rely upon them in support of a classification proposal – whether they be carrier interests or shipper interests – must make the raw data underlying the studies and analyses available to interested persons. (November 20, 2001 Decision at p. 16).

Apparently, the Board does not share NASSTRAC's position regarding the reasonableness of supplying data to support a classification action.

NASSTRAC's second contention is that there is structural "bias" in the processing of classification matters. (NASSTRAC Comments, pp. 3-6). To support that allegation NASSTRAC engages in a series of misstatements which lack substance. It reiterates its misstatement discussed above, that extensive information is sought from shippers once a proceeding is initiated. NASSTRAC goes on to state that the "NCC attacked, but did not deny, NASSTRAC's statement [in the lead proceeding] that information is routinely sought which is not necessarily relevant to the inquiry initiated by a carrier member." Further, it contends that

the "NCC did not rebut NASSTRAC's statement that providing the requested information may impose severe burdens on shippers." Reference to pages 13 to 16 of the Statement of Joel L. Ringer, the Manager of Classification Development, in the NCC's April 1, 2005 Reply Comments in the lead proceeding shows that NASSTRAC's contentions misstate the record. The only information sought by NCC staff relates to the recognized transportation characteristics of an article which must be considered in relation to any classification proposal or reclassification action to ensure that a reasonable provision is established. However, as demonstrated, the survey form sent to shippers is not extensive or burdensome, and how such data would "impose severe burdens on shippers" is never validated by NASSTRAC.

In responding to the "hypothetical example" postulated by NASSTRAC regarding a "10″ Revere frying pan," Mr. Ringer pointed out that the example was ludicrous. The classification by design and function is not so myopic that a single article within a commodity group, a "10″ Revere frying pan," would be the subject of a separate classification action. *See*, e.g., *Planters Compress Co. v. C.C.C. & St. L. Ry. Co.*, XI I.C.R. 382, 405 (1905). Rather, classification involves the grouping of commodities so that similar or related articles can be classified similarly. NASSTRAC's attempt to cast Mr. Ringer's explanation as having failed to "deny that its staff would in fact seek data as to *all* transportation characteristics of *all* pans (and possibly all cookware) made by *all* manufacturers, forcing numerous manufacturers to gather and present extensive data" is a self-serving fabrication without any basis in fact.

Counsel for NASSTRAC, who is representing shippers in a pending ceiling fan classification matter before the NCC, attempts to characterize that classification action as evidence of "structural bias." Mr. Ringer fully addresses those allegations in his statement and they need not be repeated here. However, how can the NCC staff be criticized for attempting to

ensure that ceiling fans when shipped with lighting fixtures exhibit the same or similar transportation characteristics as those articles alone? The resolution of that classification issue is not found in NASSTRAC's "simple solution" of amending the item "to cover ceiling fans with or without lighting fixtures." (NASSTRAC Comments, p. 4). That quick fix would have ignored the agency-approved classification principles upon which classification actions are to be based.

NASSTRAC's speculative allegations regarding the lamps and lighting fixtures reclassification cannot be given any weight. It is conceded that neither NASSTRAC nor its counsel was involved in that classification action. Moreover, the data of the American Lighting Association members is not a record in any proceeding before the Board nor has NASSTRAC counsel stated that he has any familiarity with that information. Yet, NASSTRAC counsel, without any foundation, cavalierly asserts that "it appears likely that the data of the American Lighting Association members was ignored by the NCC on that occasion for similar reasons." (NASSTRAC Comments, p. 5). That assertion is reckless and evidences the lack of credibility of the many such self-serving allegations made by NASSTRAC.

NASSTRAC's lament that the NCC has a staff with six classification specialists working full time on NMFC issues, and NASSTRAC and ALA have no in-house freight classification expertise, misses the mark. The NCC's procedures rebut the attempt by NASSTRAC to postulate a "them" versus "us" scenario. Many of those provisions are designed to have the NCC staff assist shippers and other interested persons to participate in the classification process, and to make the classification record fully accessible to the public. Procedures are also

established to enable shippers and others to seek review, either before a neutral arbitrator or the NCC, should there be disagreement with an initial classification decision.[2]

Contrary to NASSTRAC's assertion, shippers are not placed at any disadvantage in the process, but are assisted upon request and have full access to the NCC's data. NCC staff only seeks information relevant to the recognized transportation characteristics necessary to the establishment of a reasonable classification provision and no unnecessary information is sought. Of course, NASSTRAC neither documents its allegation that shippers are needlessly burdened nor offers a single concrete fact that "shipper burdens and expenses far outweigh carrier burdens and costs…" (NASSTRAC Comments, p. 6).

NASSTRAC's contention that there is structural bias in the applicable standards is misplaced. (NASSTRAC Comments, pp. 6-8). NMFC Item (Rule) 422 misinterpreted by NASSTRAC, is a rule of tariff application and not a classification standard. That item is not in issue in this proceeding. Similarly, the NCC's Density Guidelines originated in ICC proceedings and have been approved by the ICC and the Board in numerous classification proceedings as reasonable. NASSTRAC's simplistic "linear density formula" has no rational predicate, and has been fully responded to in the NCC's April 1, 2005 Reply Comments. (*See* Pugh Statement, pp. 7-9). Its bare reiteration of that contention here is not responsive to the Board's decision in this reopened proceeding.

Most specious is NASSTRAC's incorrect comments regarding the authority of the NCC member carriers to establish classifications, and impertinent remarks regarding NCC staff. (NASSTRAC Comments, pp. 8-9). First, NASSTRAC is wrong in asserting that the member carriers "have the right to create, continue and change the procedures and standards applicable to

[2] *See*, e.g., Articles III, Section 1(c), (d) and (f); Section 2(c); Section 3(c)(1)(i)(ii) and (iii) and (3), (e), (f)(3), and (g); Section 4; Article IV, Rule 2(b) and (c), Rule 3(b); Rule 4(a),(b) and (c); Rule 5 and Article V, Arbitration.

freight classification." The NCC can only initially establish a classification, subject to arbitration by a neutral. The procedures by which classifications are established must be and have been approved by the Board. Any changes in those procedures cannot be effectuated without Board approval. By the same token, the applicable classification standards have been prescribed and modified by the former ICC. Those standards are not and cannot be the product of NCC action, without Board approval.

It is entirely improper for NASSTRAC to question the integrity of NCC staff and carrier members and employees, and the Board should so admonish the author of such a serious and totally unsupported assertion. If NCC cannot have it both ways, neither can NASSTRAC. If a "clear financial interest" is all that is necessary to establish "bias," how can shippers and their employees be impartial in making classification decisions affecting their products or those of their competitors?

NASSTRAC has not made any showing which would justify removal of the statutory right of carriers to establish freight classifications by "outsourcing" that function to an academic institution. This same shipper organization insisted the arbitration process is essential to a fair classification decision and then, never having attempted to use that procedure, characterizes it as too expensive and burdensome.

NASSTRAC's assertion that classification-making is price fixing is untenable. (NASSTRAC Comments, pp. 10-11). The functions of classification-making and ratemaking have long been recognized as entirely separate and distinct. NASSTRAC's position that they are the same is unfounded, and is contradicted by the Department of Justice's position in this proceeding which suggests that the NCC could seek a Business Review Letter to conduct its activities.

NASSTRAC's purported "reforms" are nothing more than measures to complicate and impair the classification process. (NASSTRAC Comments, pp. 12-14). The classification standards applied by the NCC are "neutral" and have been approved by the agency. NASSTRAC presents no rational basis for its "linear density formula," and the Item (Rule) 422 is not a classification standard, as NASSTRAC incorrectly states.

It appears that NASSTRAC, which incorrectly accuses the NCC of being the prosecutor, jury and judge in classification matters, wishes to have shippers possess those roles in confirming whether a "*prima facie*" change for a classification proposal has been made. The suggestion that a *prima facie* showing should be required is plainly another roadblock NASSTRAC seeks to impose on the process. Data compiled from shippers and carriers is essential to the determination of whether further classification action is required. The NCC does not "automatically request information as to *all* transportation characteristics of all types of a commodity when only one transportation characteristic of a particular example of a commodity at issue." NASSTRAC can point to no example where this has occurred, other than the hypothetical example it has constructed of the 10" Revere frying pan.

The issue of shipper voting on the NCC is covered in the lead proceeding and will not be repeated. However, NASSTRAC's contention that carriers do not recuse themselves when voting on whether or not to increase a commodity's class rating, has no relationship to the issue of shippers voting on classification proposals affecting their own or competitive products. A carrier's decision to approve or disapprove a classification action must be based on established classification standards and meet the statutory test of reasonableness. None of those factors apply to a shipper's determination of whether a classification proposal impacts its products or those of a competitor. Those considerations are not subject to agency oversight.

NASSTRAC'S request for the creation of an advisory group of carriers and shippers to work out "mutually agreeable improvements in NCC processes and standards and report back to the Board" is unnecessary and unrealistic. NASSTRAC has made its opposition to continued antitrust immunity clear, and the changes it has proposed have nothing to do with "improvements" in the classification system. As discussed above, those changes are designed to impair the classification process by further complicating the ability of the NCC to implement classification actions. NASSTRAC has not shown that the current procedures, in large part designed and approved by the Board, require further revision. Unfounded allegations are not sufficient for agency action.

E. The U.S. Department of Transportation and U.S. Department of Justice Comments Are Not Responsive to This Proceeding

The Surface Transportation Board (Board) in its Decision served on October 13, 2005 instituting this investigation proceeding clearly stated that its purpose was to develop a more thorough record regarding "charges of abuse of market power" by the NCC as concerns the NCC's practices in general, and particularly as those practices relate to the reclassification of lighting products and fixtures in 2004. Neither the comments of the Department of Transportation (DOT) nor those of the Department of Justice (DOJ) address any of those matters and are entitled to no weight in this proceeding.

DOT plainly recognizes what issues are properly under investigation here, but candidly concedes that it "is not familiar with the specific facts behind the reclassification in question, and we have no concrete information on the effectiveness of the particular conditions now in place." (DOT Comments, p. 1). Nonetheless, notwithstanding that critical admission, DOT proceeds to reiterate its position opposing antitrust immunity, which is not related or relevant to the focus of this investigation.

Totally specious is DOT's contention that the "supporters of continued approval and immunity for the NCC agreement both misapprehend antitrust law and at the same time seek to benefit from their purported misunderstanding." (DOT Comments, p. 3). Congress, which unlike DOT, does have a clear understanding of the freight classification and its value to the transportation community in constructing a rational pricing system, has continued antitrust immunity for the collective establishment of the classification of freight in each of the revisions of the legislation affecting motor carriers which has occurred since 1980. Moreover, the former Interstate Commerce Commission and the Board in each of its investigations and reviews of the NCC's collective classification-making agreement ultimately concluded that it served the public interest. Any misunderstanding that exists here is on the part of DOT and not the NCC.

Again, without any specificity or substance and having admitted that it has no familiarity with the NCC's classification procedures, DOT states that "The current freight classification system invites anticompetitive activities and results." Further, it recommends that consultation should be had with "appropriate counsel and antitrust authorities" to develop a freight classification system "cleansed of anticompetitive elements." (DOT Comments, p. 4). Those gratuitous and baseless statements are without any foundation and are not properly before the Board in this proceeding.

The DOJ comments go even farther afield. Rather than present any factual matters or arguments addressing the issues identified by the Board as comprising this investigation proceeding, DOJ reiterates its long-standing opposition to antitrust immunity. The major portion of its comments have nothing to do with the NCC or the classification process, but is directed at the rate bureaus and collective ratemaking, which are not even under consideration in this or the

lead proceeding dealing exclusively with the classification and the NCC's Section 5a Agreement. (*See* DOJ Comments, pp. 1-7).

With respect to the freight classification and the need for antitrust immunity, DOJ dismisses the serious concerns of the motor carriers regarding potential antitrust liability for participating without immunity in the collective freight classification process. It goes on to suggest that to allay those concerns the carriers can apply to the Antitrust Division for a business review letter to ascertain the Division's present enforcement intentions regarding proposed business conduct, i.e. the formulation of a freight classification without antitrust immunity. (DOJ Comments, pp. 5-6). Interestingly, this is the same DOJ which advised the Motor Carrier Ratemaking Study Commission, which was established by Congress in conjunction with the Motor Carrier Act of 1980, that:

> There is no question that the freight classification, as presently administered and used, is anticompetitive and would be, absent immunity, highly vulnerable to antitrust attack. (Report of Motor Carrier Ratemaking Study Commission, p. 504).

Among the features of the classification that led DOJ to that conclusion was the grouping of commodities into a single class—a principal function of freight classification today.

Also, other antitrust authority does not agree with DOJ's cavalier assumption that freight classification does not require antitrust immunity. As was pointed out in Antitrust & Trade Associations, *How Trade Regulations Apply To Trade And Professional Association*, A.B.A. Section of Antitrust Law, 1996:

> Association activities that have caused antitrust problems include the exchange of price-related information (including cost or profit data), development of terms or conditions of sale, methods of distribution, joint research, and *product standards* and certification programs. (Emphasis supplied) (At pp. 2-3).

Furthermore, regarding DOJ's dismissal of the concerns of carriers to participate in a classification process in the absence of antitrust immunity, it was pointed out in that treatise that:

> Some companies will decline to join or participate in association programs unless provided with adequate assurance their activities and procedures are undertaken and developed with an acute awareness of antitrust risks and penalties. (At p. 2).

The DOJ comments are not responsive to the Board's Decision, raise matters unrelated to freight classification, and should not be accorded any weight.

SECTION V

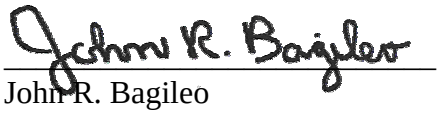
CONCLUSION

V.

CONCLUSION

For these reason, and those set forth in the NCC's filings in Ex Parte No. 656, *Motor Carrier Bureaus – Periodic Review Proceeding*, it is requested that the NCC's current classification-making agreement be approved.

Respectfully submitted,



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